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FILED
AUG 6 - 2004
OFFICE OF THE CLERK

No. 03-1039

IN THE SUPREME COURT OF THE UNITED STATES

JILL L. BROWN, Acting Warden, *Petitioner,*

v.

WILLIAM CHARLES PAYTON, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari filed January 15, 2004
Certiorari Granted May 24, 2004

CAPITAL CASE

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

May 3, 1996—William Charles Payton's Petition for Writ of Habeas Corpus filed in U.S. District Court for the Central District of California.

December 17, 1999—Final Order by Judge Manuel L. Real denying in part and granting in part habeas corpus relief.

February 16, 2000—Judge Real granted an application for certificate of appealability and notice of cross-appeal.

May 10, 2001—Appeal and cross-appeal argued and submitted to Judges Pamela A. Rymer, Michael D. Hawkins and Ronald M. Gould, Circuit Judges.

August 2, 2001—Opinion filed by the Ninth Circuit (panel) reversing in part and affirming in part.

September 5, 2001—Combined Petition for Rehearing and Suggestion for Rehearing En Banc filed by William Charles Payton.

December 19, 2001—Order granting rehearing en banc.

March 20, 2002—Rehearing argued and submitted en banc to Mary M. Schroeder, Harry Pregerson, Alex Kozinski, Stephen S. Trott, Ferdinand F. Fernandez, Thomas G. Nelson, A.W. Tashima, William A. Fletcher, Richard A. Paez, Marsha S. Berzon, Richard C. Tallman, Circuit Judges.

August 1, 2002—Opinion filed by the Ninth Circuit (en banc) reversing in part and affirming in part.

August 19, 2002—Petition for rehearing before en banc court with a suggestion for rehearing by the full court filed by Jeanne Woodford.

September 30, 2002—Order denying petition for rehearing.

December 12, 2002—Petition for Writ of Certiorari filed by Payton.

December 27, 2002—Petition for Writ of Certiorari filed by Woodford.

April 21, 2003—Payton's Petition for Writ of Certiorari denied by the United States Supreme Court.

April 21, 2003—Woodford's Petition for Writ of Certiorari granted by the United States Supreme Court with an order remanding to the Ninth Circuit for further consideration in light of *Woodford v. Garceau*, 538 U.S. 202 (2003)

June 3, 2003—Supplemental briefing filed by Payton and Woodford regarding the application of AEDPA.

October 20, 2003—Opinion filed by the Ninth Circuit (en banc) reversing in part and affirming in part.

October 30, 2003—Order granting motion to stay the mandate pending petition for writ of certiorari.

EXCERPTS FROM REPORTER'S TRANSCRIPT ON APPEAL

In the Supreme Court of the State of California

Case No. 22151

The People of the State of California

v.

William Charles Payton

[November 23, 1981, by Mr. Merwin]

[1902]

*****

Secondly, I think some of those categories are

[1903]

really designed, even if not specifically set out for the purpose of, allowing the defendant, if he wishes, to present background.

Now, if we went into something and I portrayed him as a choirboy, then I think that would be completely legitimate rebuttal, but I don't think that's open under a fair reading of the statute.

The Court: I would have to think, as I said -- I think I would have a tendency to think that more could come in, depending what the defendant opens up. I think I would have a tendency to agree somewhat with that.

I can't find any guidelines, but I would have a tendency, as I said, to feel that that area is somewhat limited. As I said, I think it's -- the more the defendant goes into it, as I said, and opens it up, I think it would be a tendency to be more of a lesser rebuttal.

As far as proceeding, I'll propose that the People put on their case and the defendant can put on their case. If the People want to put on rebuttal, the defendant can put on additional rebuttal also. That is what I am planning.

Anybody want to make opening statements or –

Mr. Jacobs: At this time I'm inclined not to make an opening statement.

The Court: I will give you a chance to, and as far as closing, I will put on the record, get into -- I intend

[1904]

to have the People open and the defendant close, just give you each one shot.

Mr. Jacobs: That's fine.

Mr. Merwin: That is fine.

Mr. Jacobs: That's what I expected.

The Court: We could go one, boom, boom, and back to you again, I mean back to let Jim have two.

Mr. Jacobs: Somewhere it says discretionary, in some cases it says preferred order is to give the defendant the last shot.

The Court: I am not going to go three and put you in the middle. I think it's better to go one and one. I don't see any need for it. That is what I am tentatively going to do.

Okay, gentlemen.

Mr. Merwin: Okay. See you tomorrow.

(Evening adjournment.)

* * * * *

[November 24, 1981]
[1927]

The Court: Yes, sir, you may.

Mr. Jacobs: Okay. I think the defense and the State at this time are willing to stipulate with regard to Mr. Payton's prior record that on April 14th, 1976, in the state of Idaho, the defendant was convicted of a felony, that being illegal possession of a controlled substance, over three ounces of marijuana.

And the People are willing to stipulate to that.

Mr. Merwin: We'll stipulate to that.

The Court: All right.

Mr. Jacobs: Okay. Second stipulation would be that then on October 8th, 1976, the defendant, Mr. Payton, was convicted of a felony in the state of Oregon, that being rape in the third degree or unlawful consensual sexual intercourse with a minor under the age of 18.

The People are willing to stipulate to those facts.

Mr. Merwin: We'd stipulate to that.

The Court: All right. Stipulation be received, gentlemen. And you may call your first witness.

Mr. Jacobs: People call Mrs. Patty Stone.

The Clerk: Raise your right hand, please.

Patricia A. Stone,

called as a witness in behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name for the record, please.

[1928]

The Witness: Patricia A. Stone.

The Clerk: And would you spell your last name?

The Witness: S-T-O-N-E.

The Clerk: Be seated in the witness stand.

DIRECT EXAMINATION

Q By Mr. Jacobs: Mrs. Stone, is your maiden name Balun, that being B-A-L-U-N?

A Balun.

Q Balun. In 1973, was that your name?

A Yes, it was.

Q Okay. Miss Stone, do you know the defendant in this case, Mr. Payton?

A Yes, I do.

Q And were you acquainted with him back in September of 1973?

A Yes, I was.

Q Okay. Directing your attention to the date of the evening, Saturday evening, September 15th, 1973, did you meet with him somewhere in Orange County?

A Yes, I met him at a party.

Q Okay. And after you met him at a party, did you go somewhere with him?

A Yes, a friend and I took him with us. His car wouldn't start.

Q And where did you go?

A We went to a liquor store first, and then we

[1929]

went to my apartment.

Q Okay. Sometime later -- was your apartment in the city of Anaheim?

A Yes, it was.

Q Okay. Sometime later that evening, did you have occasion to be alone with Mr. Payton?

A Yes, my -- my friend didn't come up to the apartment. She left.

Q Okay. And sometime later after that, did you and Mr. Payton go to bed together?

A Yes, we did.

Q Did you have sexual relations with him?

A Uh-huh. Yes.

Q Okay. After that, did you fall asleep?

A Yes, I did.

Q Okay. Did you awake -- did you awake sometime after that?

A Yes. I woke up and had a knife at my neck.

Q Okay. And did you see who was holding the knife?

A Yes, I did.

Q Who was that?

A Mr. Payton.

Q And what happened after you awoke and saw the knife?

A I wasn't quite awake yet, and I -- I don't know, I just kind of said, you know, "'knock it off," and --

[1930]

and then the next thing I knew I was being stabbed.

Q Okay. Do you know what kind of a knife you were being stabbed with?

A It was a -- it was one of my kitchen knives.

Q Where were you stabbed?

A I was stabbed in my upper right arm and my right chest.

Q In your chest. The stab wound to your chest, do you know, was it just a light stab wound or was it a deep stab wound?

A No. It was a deep wound.

Q And how many times total, do you know, you were stabbed?

A I'd probably say three or four in my arm and probably a couple times in my chest and --

Q Did it leave -- did the stab wounds leave scars?

A Yes.

Q Do you still have them today?

A Uh-huh.

Q At some point did he eventually stop stabbing you?

A Yes. I finally got him off of me and I went in to the front room and called the police.

Q Were you bleeding?

A Yes, I was.

Q Did Mr. Payton stay in the apartment?

[1931]

A Yes, he did.

Q Did you essentially end up laying down on the floor?

A Uh-huh, until the police came.
Q When the police arrived did they give you first aid?
A Yeah.
Q The paramedics arrived shortly afterwards?
A Uh-huh.
Q Was -- Mr. Payton stayed in the apartment?
A Yes, he did.
Q Was he arrested?
A Uh-huh.
Q And were you taken to the hospital?
A Yes, I was.
Q And how many days did you stay in the hospital?
A I was -- about two and a half.
Q At any time that evening prior to your waking up and seeing the knife at your neck, had you had any type of argument with Mr. Payton of any type?
A No, I didn't.
Mr. Jacobs: Okay. Thank you. I have no further questions.
The Court: You may inquire, Mr. Merwin.

CROSS EXAMINATION

Q By Mr. Merwin: Mrs. Stone, I gather this came

[1932]

out of the blue as far as you were concerned?
A Yes.
Q Had you and Mr. Payton dated before that evening?
A Yeah, about a year and a half before we had gone out.
Q Had you lived together for awhile?
A Yes, we did.
Q So this wasn't the first time you had intercourse?
A No.
Q What was the general theme of the conversation that evening before you went to bed?

A We were talking about just old times, the group of people we used to run with, and that was all.
Q So it was light or pleasant?
A Uh-huh.
Q Did Mr. Payton assist in the first aid?
A Yeah. He put a towel around my arm.
Q After he was arrested did you go to visit him at the jail?
A Yes.
Mr. Merwin: Thank you. I have nothing further -- one last question.
Q By Mr. Merwin: Had you taken any drugs that evening?
A No, I hadn't.
Q To your knowledge had Mr. Payton?

[1933]

A I wasn't -- I don't know. I didn't see him do any.
Mr. Merwin: Thank you. I have nothing further.
The Court: Mr. Jacobs.

REDIRECT EXAMINATION

Q By Mr. Jacobs: Prior to going to sleep with Mr. Payton, did he seem cognizant, in other words, aware of what he was doing?
A Yes, he did.
Q He didn't have any problems conversing?
A No.
Q He seemed intelligible; is that correct?
A Uh-huh.
Mr. Jacobs: I have nothing further.
The Court: Mr. Merwin.

RECROSS EXAMINATION

Q By Mr. Merwin: Did he make any statement to you

indicating what he thought was happening at the time of the stabbing?

A Like why?

Q Yes.

A No.

Mr. Merwin: Nothing further.

Mr. Jacobs: Nothing further.

The Court: Thank you, ma'am. You're excused. Call your next witness.

[1934]

Mr. Jacobs: People call Danny Escalera.

Daniel Larry Escalera,

called as a witness in behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Daniel Larry Escalera.

The Clerk: Spell the last name.

The Witness: E-S-C-A-L-E-R-A.

The Clerk: Be seated in the witness stand, please.

Mr. Merwin: Your Honor, before any testimony is taken from the witness, may we have a brief conversation at the bench with the reporter?

The Court: Certainly.

(The following proceedings had at the bench between Court and counsel out of the hearing of the jury:)

Mr. Merwin: I'd like to renew my objection to the introduction of any evidence from this witness regarding what amounts to his stated intent to commit future crimes regarding potential future victims, regarding any women regardless of age or appearance.

I think what we're doing is allowing through the back door evidence that cannot be properly brought in through the front door, namely, as character evidence or as evidence of intent to commit future crimes.

The Court: Mr. Jacobs.

Mr. Jacobs: Well, the way I phrase the question is

[1935]

his problem, everything I'm talking about is his problem as far as at the time when he committed the offense and that the way he views people and that's not -- if his attitude at the time of the offense is the type of testimony I'm eliciting, which is what I'm doing, then it's not -- for one thing, I think character evidence, this is his state of mind that I am trying to get into that shows the reason why the crime took place and that's the way I phrase the question.

Mr. Merwin: Excuse me. The reason I think that it's particularly offensive is that there is no other way to interpret it other than he is or he has the same attitude and he's projecting forward and everyone in this room and every woman on the street is a potential victim, and I think that's evidence of an intent to commit future crimes.

The Court: I think on your cross examination you indicated he still had that intent and so forth. I'll overrule the objection.

(The following proceedings had in open court in the presence of the jury:)

DIRECT EXAMINATION

Q By Mr. Jacobs: Mr. Escalera, you know the defendant in this case, Mr. Payton?

A Yes, I do.

Q Okay. And did you have occasion to be in custody over at the Orange County jail during the early part of

[1936]

this year, 1981?

A Yes, I was.

Q And were you -- while you were in custody, were you in the same module with the defendant, Mr. Payton?

A Yes, I was.

Q While you were in custody -- by the -- did you have any conversations with him about the case he was in custody on?

A Yes.

Q Okay. During what month was that?

A March.

Q Did you have a number of conversations?

A Yes, I did.

Q Okay. In those conversations, did he ever tell you the name of the woman's house where the alleged crimes had taken place?

A Yes, he did.

Q What was her -- what name did he give you?

A Patty.

Q Okay. And did he relate to you the facts of the crimes or what he did inside the house?

A Yes, he did.

Q Okay. And as part of those conversations with him, did he ever give you a reason for committing the acts that he told you about?

A He had a severe problem with sex and women.

[1937]

Q Okay. And did he tell you what that problem was?

A Stab them and rape them.

Q Pardon?

A Stab them and rape them.

Q Okay. When he told you that, did he tell you whether this applied to some women, all women, or what did he say?

A He said that all women on the street that he seen was [sic] a potential victim, regardless of age or looks.

Q Okay. Mr. Escalera, you've been previously convicted of felonies, is that correct?

A Yes, I have.

Q 1969, you were convicted of a felony, possession of forged checks, is that correct?

A Yes.

Q And 1976, you were convicted of attempted robbery, is that correct?

A Yes.

Q And let me see. You also have a pending robbery which you've pled guilty to, is that correct?

A Yes, I have.

Q Okay. That pending robbery, is that still pending as far as sentencing?

A I've pled guilty, and sentencing is pending.

Q Okay. Have -- as far as any promises to your sentence, what is your understanding about what your sentence

[1938]

could be?

A Okay. No -- no actual promise has been made to me. I pled to one to seven years. I'm hoping that it's brought to the sentencing judge what I'm about to do.

Q Okay. Nobody on the form -- as far as you're concerned, you could get one to seven, is that correct?

A Yes, sir.

Mr. Jacobs: Thank you. I have no further questions.

The Court: Mr. Merwin, you may inquire.

Mr. Merwin: Thank you.

CROSS EXAMINATION

Q By Mr. Merwin: Mr. Escalera, have you been convicted of any other felonies other than the ones you've mentioned?

A 211 twice and --

Mr. Jacobs: (Indicating.) This is the --
The Witness: -- forgery.
Q By Mr. Merwin: That's robbery, 211?
A Yes.
Q Is this current one that you pled guilty to, did that involve use of a knife?
A Yes, it did.
Q By you?
A Yes.
Q Held to the neck of a victim?
A Yes.
Q And you understand that the range of your sentence

[1939]

is somewhere between one and seven years?
A That's correct.
Q And you expect what you're doing here to inure or result in some sort of advantage to you even though there's no specific promise that that will happen?
A That's correct.
Q You've discussed this case and what you're doing with this case with your lawyer in your case?
A Yes.
Q And he's informed you he'll bring this testimony to the attention of the court that sentences you?
A Yes, he will.
Q And you're hoping for the one year?
A That's what I'm hoping for.
Mr. Merwin: Thank you. Nothing further.
Mr. Jacobs: Nothing further.
The Court: Thank you, sir. You're excused. You may call your next witness.
Mr. Jacobs: People rest.
The Court: You're resting at this time then?
Mr. Jacobs: Yes, your Honor.

The Court: Ladies and gentlemen, the reason I'm smiling, I hate to tell you we're going to take a break right now, but the People have rested their particular case at this time.
I do want to indicate to you in this particular

* * * * *

[1944]

Santa Ana, California - Wednesday, November 25, 1981
Morning Session

(The following proceedings had in open court in the presence of the jury:)
The Court: Usual stipulation, gentlemen?
Mr. Jacobs: Yes.
Mr. Merwin: Yes, your Honor.
The Court: Mr. Merwin, do you desire to make an opening statement?
Mr. Merwin: No, your Honor.
The Court: All right. You may call your first witness.
Mr. Merwin: Pastor John Kirk.

John 0. Kirk,

called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:
The Clerk: State your full name for the record, sir.
The Witness: John 0. Kirk.
The Clerk: Spell the last name.
The Witness: K- I- R- K.
The Clerk: Be seated in the witness stand, please.

DIRECT EXAMINATION

Q By Mr. Merwin: What is your profession, sir?
A I'm a pastor or minister.
Q And what church?

A Trinity Community, Four Square Church in Buena Park, California.

[1945]

Q How long have you been in the ministry?
A Since 1935.
Q So that's 46 years?
A Something like that.
Q How long have you been at this church that you just mentioned in Buena Park?
A Over 20 years.
Q You recognize Bill Payton?
A Yes, I do.
Q When did you first meet Mr. Payton?
A Bill became one of the high school young people of our church about ten years ago, ten, 11 years ago.
Q This is the Trinity Community Church in Buena Park?
A Right.
Q Did he come with parents or did he come alone?
A Came -- came alone.
Q How long was he involved in your church group?
A I'd say couple years.
Q Did you --
A Possibly one or two years.
Q Did you form any impressions during that period of his life, 16 to 18 roughly --
A Yes.
Q This period you're talking about? Regarding any of his abilities?

[1946]

A Yes, I -- I -- I felt and appraised Bill as a very bright, articulate young man with charisma and with outstanding potential.

Q Did you feel that he was committed to serving the Lord at that point in his life?
A No. I never did. I felt that he was uncommitted.
Q After this two-year period that you've discussed, did you then follow Bill's progress?
A No, Bill drifted out of the picture.
Q Do you know when he left the church what happened to him of your own knowledge?
A No, I do not.
Q When was the next time you contacted Bill Payton?
A In the Orange County jail.
Q How did you learn that he was in the Orange County jail?
A A fellow pastor. He had written a fellow pastor, and the pastor knowing that we had had contact with him in his early years contacted me. This pastor telephoned me, and I went to see Bill.
Q How many different times --? Well, roughly when was that first contact at the Orange County jail?
A I would say shortly after he was incarcerated, brought back from Florida, maybe a month? Something of that type after he was in jail in 1980.
Q How many times have you seen him at the jail

[1947]

since that occasion?
A I would estimate six, eight times.
(Continued on page 1948; nothing omitted.)

[1948]

Q How long did these interviews last, or these conversations?
A Maybe an average of 45 minutes face to face, either in a conference room or at the bench there where we had personal face to face conversation.

Q During these conversations did you discuss religion?

A Oh, yes.

Q Have you an opinion now whether or not Bill is committed to serving the Lord?

A Could I first say something? I felt deeply disappointed in Bill when he was in our church, I felt that --

Q Why is that?

A I felt that Bill had not really lived up to the potential that he could have lived up to with the commitment to the Lord.

Of course, when I came to the county jail and we began to talk about religion, I sensed a great remorse and regret in Bill for the life that he had -- the things that he had done.

Q Did you form an opinion based on your interviews with Bill at the jail as to whether or not there's some change in his life regarding religion?

A Yes, I did. I think one of the first things I said to Bill, well, Bill, let's not have a snow job. We can't give God a snow job. You can't give yourself a snow

[1949]

job. Let's not give me a snow job.

I have felt that Bill had made a commitment of his life to the Lord Jesus according to the New Testament and Bible principles.

Q Since you brought up the subject of snow job, initially, I infer that's always a question in your mind whether someone is being sincere or insincere with you when he or she talks about a commitment to religion?

A I think that's certainly true. After all, we have to prove our walk.

Q Did you form an opinion whether or not Bill was sincere about what he was telling you about his change in life regarding religion?

A I sincerely believe that Bill has made a commitment and that he is sincere in his statement and commitment to the Lord.

That is my own personal opinion. We can never be a hundred percent sure of anything of another person.

In fact, I wonder sometimes if we can be a hundred percent certain about ourselves.

Mr. Merwin: Thank you. I have nothing further.

Mr. Jacobs: No questions.

The Court: Thank you, sir. You are excused.

You may call your next witness.

Mr. Merwin: Barbara Seglie.

Barbara Seglie,

called as a witness in behalf of the defendant, having been

[1950]

first duly sworn, was examined and testified as follows:

The Clerk: State your full name for the record, please.

The Witness: Barbara Seglie.

The Clerk: Would you please spell your first and last name?

The Witness: B-A-R-B-A-R-A S-E-G-L-I-E.

The Clerk: Thank you. Be seated in the witness stand, please.

DIRECT EXAMINATION

Q By Mr. Merwin: Barbara, you've attended the trial in this matter?

A Yes.

Q When did you first meet Bill Payton?

A In May of 1981.

Q At that time were you involved in a local church here in Santa Ana?

A Yes. I am on a voluntary staff as Missions Director for the Eagles Nest Christian Fellowship.

(Continued on page 1951; nothing omitted.)

[1951]

Q Where is that located?
A In Santa Ana on Edinger.
Q How many members or constituents are there?
A There are 3,000 or more.
Q How long has that church been in existence, to your knowledge?
A The last three years.
Q What are your responsibilities as Missions Director and counselor at that church?
A Well, I'm responsible for administrating about seven outreaches there at the church which consists of the prison ministry, the orphanage, the missionary outreach, convalescent homes, witnessing and things of this type as far -- and also storage of food and clothing which we distribute to the poor.
Q How did you first come in contact with Mr. Payton?
A Mr. Payton had called me because he received a publication from the church, I think from another inmate's wife, who attended our church. And so he called the church in the hopes of getting some counseling and some Christian fellowship and instruction as to the Bible.
Q When did this first contact with the church from Mr. Payton occur?
A In May.
Q In May of this last year?
A Of '81, yes.

[1952]

Q Did you go to see him at the jail?
A Yes, I did.
Q How many times have you seen Mr. Payton at the jail?
A I would say about 15 times. I don't have an exact number on it.
Q Now, where do you talk to him at the jail?

A I go to the attorney bonds section where you can either have a closed-in booth and talk privately or it's over a -- a counter-type situation.
Q When you go, do you go by yourself or do you go with someone else?
A I have gone by myself and I like to bring a male counselor with me so that he would have some kind of contact with a man of his age who is serving the Lord on the outside so he would have an example.
Q How long do these interviews or conversations with Mr. Payton normally last?
A Well, we generally have a freedom. So they could go anywhere from two to five hours, and they have generally gone that long.
Q What topics are discussed during these conversations?
A Well, generally Mr. Payton has a number of questions pertaining to scripture, Bible studies and things of this type that would enable him to serve the Lord in a greater

[1953]

capacity as far as prayer and worship and counseling and instructing others within the prison.
Q During these conversations or interviews, does he become involved or is he sitting there listening to you talk?
A It's a two-way conversation.
Q Is there any question-and-answer aspect of these conversations?
A Oh, yes, generally. It's a -- a normal conversation, instruct -- in answer to his questions, and we ask questions as well.
Q What types of questions does Mr. Payton present?
A Well, he has questions as to the Holy Spirit and learning about the spirit of God, how to pray, how to worship God, what -- what would be necessary to take a life, like such as his own, and consecrate it to God's work and what kind of manner of person he would have to be to serve the Lord.

Q You familiar with a correspondence Bible college, Rhema Bible College in Oklahoma?

A Yes, it's one of the most reknowned [sic] Bible colleges in the United States. And Mr. Payton was accepted by that university in correspondence course, and which I believe he has just started.

Q Now, you said that's reknowned [sic]. Is that well regarded --

[1954]

Or --

A Yes, yes. It's a very well regarded university in the United States. In Tulsa, Oklahoma.

Q What makes you believe he's been accepted?

A Well, I've -- I've received the letter and his lessons which have been given to him. So I saw the letter from Kenneth Hagen accepting him and stating that if he did not have the funds to pay for the -- the course, that it was okay. If any funds would come in, they would accept it, but there would be no charge otherwise.

Q Has Mr. Payton told you anything about a change in his life relative to religion or faith?

A Oh, definitely. I'd say that that's been the primary motivating force within his life now that he's been incarcerated. And that's -- definitely has changed his life.

Q In what way?

A Well, as opposed to being a self-centered person, he has now become a selfless person in that he seeks to serve God. He's consecrated his life to God in that he's not only accepted a statement of the faith but he is taking that faith and applying it in action by witnessing and establishing Bible studies and quite an extensive outreach as far as Bible tracks and literature for the other inmates.

Q Let me back up a moment.

A Uh-huh.

Q Now, we're all, I'm sure, aware that he could

[1955]

be telling you that there's been a change in his life.

A Uh-huh.

Q Regarding his faith. And it could be false. I mean, that's possible.

A Uh-huh.

Q Do you think he's sincere?

A Yes.

Q Why do you think he's sincere?

A The quality of his questions are in depth. His knowledge of the scriptures is extensive.

(Continued on page 1956; nothing omitted.)

[1956]

He has a good knowledge over the last year to not only memorize the Scriptures but apply them in certain problem situations, and that's taking his faith and applying it.

Q You mentioned that he's setting up Bible classes?

A Uh-huh, within the -- within the different tiers at the jail here.

He has Bible studies, I don't know what nights, I think perhaps Monday night he said recently -- he just had a very successful Bible study on Monday night and he has sometimes 15 other inmates there.

I have on several occasions met with him and a couple of the other inmates that he has led to Christ in the hopes of instructing all them together.

So I've always seen him with other inmates in regard to his Christian walk at this point.

Q Where does this joint conversation or interview occur?

A In the attorney bonds section of the jail.

Q So you would be present with Mr. Payton and other inmates?

A Other inmates and usually another counselor.

Q So you've had a chance to observe his interaction with these others?

A Yes.

Q What sort of conversation or what sort of statements

[1957]

was Bill making during these joint interviews?

A Well, he might assist the -- one of the other inmates if they were having a particular question to -- if the next gentleman had a question on -- in his studies, maybe he wasn't quite as literate as Mr. Payton, so he would kind of enhance him so that I would understand what problem he was having with the -- with his walk, with his studies.

Q You said one of the things he's doing is witnessing. What do you mean by that?

A Witnessing is declaring your faith and your faith in Jesus Christ and how that faith has changed your life from an old life, an old dead spiritual life to a new one in the hope of what we attain to, which is to spend eternity with God.

Q What makes you believe he's witnessing in that sense?

A I have quite a few letters which he witnesses to other people in other jails. He's corresponding to them and plus the fact that I have names of other inmates that he has led to the Lord and I've also been with him with these other inmates.

Q So you have letters from Mr. Payton to other inmates?

A No. From the responses.

Q And where are these other inmates located?

A In various jails, prisons around the area.

[1958]

Q Since your first contact with Mr. Payton here in the Orange County jail, have you seen any changes in him?

A Yes, I definitely have.

Q What changes?

A I find that he's definitely matured and mellowed, if that would be a common word. He's been -- become more serious and more self-disciplined.

Q How do you mean self-disciplined?

A Well, in his course of studies, he not only studies the Bible but I believe he completed some calculus courses. He's set up a program of exercise. He has written extensively and has completed, just about completed an autobiography which has an excellent chance of being published in an international -- published from an international Christian publishing house.

Q What makes you think that?

A Because I've been in contact with that publishing company and they may, in fact, want to come down to the jail and interview him before he is sent wherever he is sent.

Q Is there any other ways in which you've seen changes in Mr. Payton?

A In the -- not only in the questions initially when I first met him where it would be -- he was interested in his own personal interest, and how he could become a better Christian, but now his questions not only incorporate his own, but in others. He wants to make sure the other inmates

[1959]

have their questions answered as well.

He's set about goals, you know, he's kind of taken his mind off the problem situation of the trial and applied it to what he can be as a Christian and developing a ministry within the prison system that would totally rehabilitate prisoners, not as it has been in the past by the state rehabilitation systems.

Q When he tells you that is his goal he's set for himself, do you think he's sincere?

A Yes.

Q How would you describe his relationship with the other inmates insofar as you are aware of?

A It seems to me that he gets along fairly amiably with a good portion of them. He seems to be a leader in the sense that from what I understand, the number of gentlemen come up to him and situations where they are having problems with sins or maybe their wives have left them in the course of while they are staying in prison, and they generally come to Bill for counseling. And that puts him in a leadership or a teaching position, and I would say that would mean a good portion of the inmates respect him and trust him and have a confidence in him.

Q Now, we've talked about some face-to-face conversations you've had with him. Have you had any correspondence with him?

A Uh-huh. Yes, I have.

[1960]

Q Does he write to you?

A Yes, he does. He writes letters.

Q Do you have any of the letters he's written that reflect his style of writing or his ability of writing?

A Yes. I have a couple of excerpts from his autobiography and I also have his personal journal which he entrusted to me because I guess there was some kind of situation in the jail where his writings were being discarded by some of the guards and he wanted to make sure they were preserved and in a safe place.

Q Do you have some samples of this writing with you?

A Yes, I do.

Mr. Merwin: If the Court has no objection, I'd like to have these read, and I am offering them for the style they reflect.

The Court: They will be received.

The Witness: Should I read some?

Q By Mr. Merwin: Yes.

A This is written in his own hand. I take it they're not allowed to use pen, so it's all written in pencil and I don't believe he knew that I would -- somebody would have these, but I do have them now.

This is a little section of when he arrived in his platoon in Vietnam, when he first arrived.

(Continued on page 1961; nothing omitted.)

[1961]

"As my platoon stood helplessly lost beside a C-140 transporter, I couldn't help thinking how ridiculous, lamely, even naively we must have looked. We all definitely were new meat to Vietnam, and everyone who looked upon us knew it. There's something about having every item on your person being new that makes you ill. New fatigues, packs, weapons, even new shorts. For the present time, we were cherries and would remain so until the struggles of monsoons had seasoned us and the smell of battle had matured our thinking. Ugly but so very accurate.

"Scanning the ocean, it was impossible not to notice the constant pressure of tension, the possibility of anything possible happening. To look into the eyes of one who had spent much time in this rain soaked, humid land of 30 years of war was a scare -- was a story in itself.

"If you were 20, your chances of appearing 30 --30 years old upon departure were about the norm. They all looked tired. They all looked ready to go home. So they were. For this was the reception center. Cam Ranh Bay, Vietnam. Those leaving and those who arrived came here."

Here's another section. I believe this took place when he had fled to Florida. And he -- he -- this is just something -- this is all written, of course, after the fact.

"As I sat pushing my feet deep into the sun warmed sand, I allowed my eyes to wander and extend their sight to as far across the water as possible. So this is it. The

[1962]

Atlantic Ocean. While the gleaming reflections caused my eyelids to lower as much as possible, I didn't want to stop my stare.

"There was a moment's peace for the first time in weeks, wondering how God must have felt upon his creating this beautiful body of water. I -- my thoughts came to a halt at the view of a large school of whale -- seals barking their way through the ocean current, how my sole instantly yearned to be with them. Bounding our way south, twisting and weaving with precise precision. Life for them was nothing but fun while fish hunting."

And that's -- those are two excerpts from his autobiography.

Q If the jury returns a verdict of life without possibility of parole, do you think there's any valuable contribution Bill Payton can make within a prison system?

A Most definitely.

Q What?

A Most prison ministries or -- or therapy situations only take place between the therapist and the patient or the minister and -- and the prisoner. And once that situation
is ended, one-on-one situation, the minister would leave.

But if -- if he were allowed to develop this ministry, it would be valuable -- invaluable as far as he is in the system. He would be in the environment. And he would be a 24-hour-a-day availability to counsel with men.

[1963]

And plus, men learn by examples. And if he could be an

example to others, the strength of faith and dedication of his talent in the development of God given abilities, to win people to Christ, to change their lives, I think it would be invaluable. It would be something that had -- wouldn't -- has never been done in the -- in the penal system as far as rehabilitation, total rehabilitation of a criminal.

Q Do you intend to continue to assist Mr. Payton in his ministry in the prison?

A Yes, I do.

Mr. Merwin: Thank you. I have nothing further.

The Court: Any questions?

Mr. Jacobs: Just a few.

CROSS EXAMINATION

Q By Mr. Jacobs: When was the last time you met with Mr. Payton and discussed religion prior to today?

A It was Monday night, I think.

Q Yesterday?

A Wait a minute. Not yesterday. Sunday night, yeah.

Q Sunday night?

A Yeah.

Q When was the last time you met with the defendant and other inmates to discuss religion?

A I think it was in July.

Q Okay. So since July, you haven't met with the

[1964]

defendant and any other inmates in these, like, group sessions, is that correct?

A I don't think so, no.

Q Okay. Now, you talked to Mr. Payton then Monday, and that was after the verdict had come in on this case, is that correct?

A Uh-huh.

Q At that time, did Mr. Payton express to you whether or not he could -- he had planned on continuing these religious plans of his?

A Definitely.

Q What did he say? Did he say he was going to keep doing it?

A As a matter of fact, he didn't dwell on the verdict. He -- we focused in on the future of the work to make sure before he left everything would be taken care of.

Q Did he talk to you about testifying?

A He didn't know whether he was testifying or not.

Q No, whether you would testify.

A It was always a possibility, but I didn't know really until -- until Sunday night that I would be testifying.

Q Mr. Payton ever talk to you about testifying?

A He asked me if he thought -- if I was sure I would want to testify.

Q When was the subject first broached between the two of you?

[1965]

A That --

Q If you can --

A I can't really recall that.

Q Can you say whether it was months ago or yesterday or -- do you know what I mean?

A I think it was more recently.

Q Within a month or so, would that sound right?

A As a possibility of testifying, yes.

Q Now, you -- I think you testified that your opinion at this present time, you think that the defendant is basically a self -- a selfless religious person, is that what you think?

A I don't like to use the term religion because that puts one in the norm. It's a -- a statement of faith and living of faith, and I would say yes.

Q Let's just say selfless then. Okay?

A Yes.

Q Do you think he's self -- do you think if he was on the streets today, he'd be selfless?

A Uh-huh.

Q You think so?

A Yes.

Q Or do you think he's selfless because he's facing the death penalty?

A No, I think in the situation of a death penalty, many men revert to their own self-pity.

[1966]

Q You think he ever would have contacted you if he wasn't facing the death penalty?

Mr. Merwin: Objection, speculation.

The Court: Sustained.

Mr. Jacobs: I have nothing further.

The Court: Anything further?

Mr. Jacobs: No.

Mr. Merwin: No, your Honor.

The Court: May she be excused?

Mr. Merwin: Yes.

The Court: Thank you. You are excused.

The Witness: Thank you.

Mr. Merwin: The other witnesses I had planned to call today are not available today.

The Court: Do you expect them to be ready Monday?

Mr. Merwin: I expect them to be.

The Court: Ladies and gentlemen, I indicated, as I outlined, that the case will probably conclude Monday and the balance of the witnesses, unless we run into a problem, I don't anticipate we will, so again you've had a short day and I will thank and excuse you until Monday at 9:00 o'clock, and I anticipate we will conclude the case on Monday unless for some

reason we have a problem and which we don't perceive at this time.

So I do want to admonish you it's your duty not to converse among yourselves or with anyone else the subject

* * * * *

[1969]

Santa Ana, California - Monday, November 30, 1981
Morning Session

(The following proceedings had in open court in the presence of the jury:)

The Court: Good morning, ladies and gentlemen. Usual stipulation, gentlemen?

Mr. Jacobs: Yes.

Mr. Merwin: Yes, your Honor.

The Court: You may proceed, Mr. Merwin.

Mr. Merwin: We will call Phillip Arellano, and the next witness --

Phillip Robert Arellano,

called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Would you state and spell your full name, please.

The Witness: Phillip Robert Arellano, A-R-E-L-L-A-N-O.

The Clerk: Would you spell Phillip?

The Witness: P- H- I- L- L- I- P.

The Clerk: Thank you. Be seated in the witness stand, please.

(Continued on page 1970; nothing omitted.)

[1970]

DIRECT EXAMINATION

Q By Mr. Merwin: Mr. Arellano, do you recognize Bill Payton?

A Yes, I do.

Q Where did you meet Bill?

A In the Orange County jail.

Q When was that?

A Last April.

Q April of 1980?

A 1981.

Q 1981. How long -- were you housed with Mr. Payton?

A I was downstairs, and he was upstairs.

Q How many times did you see him in the Orange County jail?

A Almost every day.

Q Did you discuss religion with him?

A Yes, we did.

Q Did he indicate to you that he considered himself born again?

A Yes, he did.

Q Or committed to a faith?

A Yes.

Q Did this discussion occur frequently or infrequently?

A We talked about it all the time.

Q In your opinion, was he sincere?

[1971]

A Yes.

Q Did you discuss Bible matters?

A Uh-huh, yes.

Q Did he have any influence on you while you were in the Orange County jail?

A He brought me closer to God.

Q And how did that occur?
A By having Bible studies with me and praying.
Q Did you see his interaction with other inmates?
A Yes.
Q How would you describe that?
A I think he had a very good influence on others in there.
Q Did he seem to have a calming influence on other inmates?
A Yes.
Q During these discussions, did you and Bill discuss his feelings toward religion?
A Yes.
Q Your feelings toward religion?
A Yes.
Q And you felt that he brought you closer --
A Uh-huh.
Q -- to God?
A Yes.
Mr. Merwin: I have nothing further. Thank you.

[1972]

The Court: You may inquire.
Mr. Jacobs: Could we approach the bench for a second?
The Court: Surely.
Mr. Jacobs: I don't think we need the reporter.
The Court: Need the reporter, gentlemen?
Mr. Jacobs: I don't think so.
(Continued on page 1973; nothing omitted.)

[1973]

(Discussion between Court and counsel at the bench out of the hearing of the jury and reporter.)

(The following proceedings had in open court in the presence of the jury:)

The Court: Miss reporter, will you please come to the bench.

(The following proceedings had at the bench between Court and counsel out of the hearing of the jury:)

The Court: Okay. Mr. Jacobs.
Mr. Jacobs: Two things I want to get the Court's ruling.

First of all, I wanted to ask this witness what charge he was in on and if he was convicted of it, and I believe there's an objection to those questions,

The Court: Well, you can ask if he's been convicted of a felony. Otherwise, I think we get into misdemeanor areas or some other area.

Mr. Merwin: The nature of the felony I think is inadmissible, too.

Mr. Jacobs: Do you know what it is?
Mr. Merwin: Yes, I do. It's 288(a).

The Court: Well, you can inquire whether he's been convicted of a felony and limit it to that and not go into the nature of it.

Mr. Jacobs: The other things I wanted to ask about, I have information, although I did not intend to call witnesses, that the defendant, besides his religious teaching,

* * * * *

[1978]

mislead the jury where we have a question, negative answer, but the question is pregnant with a positive answer or the implication of a positive answer.

Mr. Jacobs: It may be that I'm going to have very probative rebuttal evidence on that. I can't be sure, your Honor.

The Court: I'll overrule the objections, gentlemen. I'll note the objections.

All right. We'll bring the jury back in.

(The following proceedings had in open court in the presence of the jury:)

The Court: You may inquire.

Phillip Robert Arellano,

called as a witness in behalf of the defendant, having been previously duly sworn, was further examined and testified as follows:

CROSS EXAMINATION

Q By Mr. Jacobs: Mr. Arellano, you were in custody, I take it, in the same module with the defendant from April though August of 1981, is that correct?

A Yes, that's right.

Q And you testified you saw him engaged in various religious activities while you were there with him, is that correct?

A Yes.

Q In addition to these religious activities, did

[1979]

you also have a -- see him -- have occasion to see him gambling in the day room with other prisoners?

A I seen him.

Q You saw him do that, didn't you?

A (Witness nods head in the affirmative.)

Q Did he do that -- he did that rather frequently, didn't he?

A I wouldn't know, because I didn't come out of my cell a lot of times.

Q But you did see him gambling, right?

A Yes.

Q Okay. Now, did you ever have occasion to hear or see the defendant extract money from other inmates to make telephone calls?

A No.

Q You never saw anything like that?

A No.

Q You're sure about that?

A Yes.

Mr. Jacobs: I have nothing further.

The Court: Mr. Merwin?

Mr. Merwin: No further questions.

The Court: Witness be excused?

Mr. Merwin: Yes.

The Court: Thank you, sir. You're excused. Thank you.

Mr. Merwin: Call Dennis Howie.

[1980]

Dennis Ray Howie,

called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Witness: I can't swear on anything because it tells you in the Bible not to swear on anything, but I will declare. I will declare that what I say is the truth.

The Clerk: Under the pain and penalty of perjury?

The Witness: Sure.

The Clerk: State your full name for the record, sir.

The Witness: Dennis Ray Howie.

The Clerk: Would you spell your last name?

The Witness: H-O-W-I-E.

The Clerk: Thank you. Be seated in the witness stand, please.

DIRECT EXAMINATION

Q By Mr. Merwin: Mr. Howie, do you know Bill Payton?

A Yes, sir, I do.

Q When did you meet him?

A Approximately four months ago.

Q Where?

A In the Orange County jail.

Q How many times have you had conversation with Mr. Payton since then?

A Approximately 10 or 12 times, somewhere around there.

Q Any of those conversations relate to religious

[1981]

topics?

A Almost all of them do.

Q Has he in any of those conversations indicated he is born again?

A Yes, he has. I know he has.

Q Do you take him to be sincere?

A Yes, I do.

Mr. Merwin: I don't have anything further. Thank you.

Mr. Jacobs: I have no questions.

The Court: Thank you, sir. You are excused.

Mr. Merwin: Keith Dandley.

Keith Douglas Dandley,

called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name for the record.

The Witness: Keith Douglas Dandley.

The Clerk: Would you spell your first and last name.

The Witness: Keith, K-E-I-T-H. D-A-N-D-L-E-Y.

DIRECT EXAMINATION

Q By Mr. Merwin: Mr. Dandley, do you know Bill Payton?

A Yes.

Q When did you first meet Mr. Payton?

A July lst, 1981.

Q Where?

A Orange County jail, mod-A.

[1982]

Q Did you live in the same mod for awhile?

A Yes.

Q For how long?

A About two months.

Q Then did you live in different mods for awhile?

A Yes.

Q How long?

A For about two more months. Now Bill's back down in my mod again.

Q Okay. How many contacts would you say you've had with Bill Payton since July lst, 1981?

A Every day that we were living together and then when he moved I didn't, of course, have any contact with him except for right when we were coming to court, and then every day for the last month.

Q Would you say you've had hundreds of contacts with him?

A Yes.

Q Is religion frequently discussed between you and Bill?

A All the time.

Q Does Bill indicate to you that he's been born again?

A Yes.

Q You think he's sincere?

A Yes.

[1983]

Q Why?

A You can tell. He lives the word of the Bible. He doesn't use any foul language. He doesn't do anything to harm anybody. He likes people. He's always trying to help people out. He helped me.

Q How did he help you?

A He saved my life.

(Continued on page 1984; nothing omitted.)

[1984]

Q How?

A I was going to commit suicide when I got to Orange County jail.

Q How did he help --

A And --

Q -- with that problem?

A Bill showed me the way to the Lord Jesus Christ. And fortunately for myself, I have -- I didn't have to commit suicide.

Q And you attribute that change in your own thinking on suicide to Bill Payton?

A Yes. I didn't have anything left to live for until I found the Lord, and Bill showed me the Lord.

Q Have you seen Bill's interaction with other inmates?

A Yes.

Q How would you describe that?

A Excellent.

Q Does Bill have a calming effect on the mod that he's in?

A Yes. When he moved from our mod up to D-mod, the whole mod fell apart.

Q What do you mean by that?

A Well, about the first week he was gone, four or five fights broke -- broke out. People were on everybody's nerves. But while he was there, we didn't have as much as

[1985]

one incident of any of those things going on.

Q After he returned to the same mod you were in, what was the -- his impact or his apparent impact on that?

A Everything is calm again. It's the Lord working through Bill. Wherever Bill is, the Lord -- the Lord is. And it has a calming effect on everybody.

Q You think Bill would be a positive influence on other inmates if he served a sentence of life in prison?

A I think Bill would be positive influence wherever he was at.

Mr. Merwin: Thank you. I don't have anything further.

CROSS EXAMINATION

Q By Mr. Jacobs: You say the defendant in your word lives the word of the Bible?

A Yes.

Q That's -- he gambles, though, doesn't he?

A No, he doesn't.

Q You never seen him gamble in the day room with other prisoners?

A No, I haven't.

Q And you've seen him every day?

A Yes.

Q How about -- has he -- you ever see him extract money from other prisoners for telephone calls?

A No. Never.

Q Never saw that once?

[1986]

A No.

Q You're sure about that?

A Positive. I got many phone calls from Bill Payton, and I never had to pay a dime.

Q You didn't have to pay for that?

A Sure didn't.

Mr. Jacobs: I have nothing further.

REDIRECT EXAMINATION

Q By Mr. Merwin: Is Bill generous with things that he has?

A If I don't have any cigarettes or candy, whatever Bill's got, I've got. That's the way it's been ever since I've known him.

Mr. Merwin: Thank you. I have nothing further.
Mr. Jacobs: Nothing further.
The Court: You're excused, sir. Thank you.
Mr. Merwin: Could we have a brief conference at the bench with the reporter?
The Court: Surely. Miss Reporter.
Mr. Merwin: Mr. Payton would like to be present. Maybe we can do this in chambers.
The Court: All right.
(The following proceedings had in chambers, court, both counsel and the defendant present:)
The Court: We're in chambers out of the presence of the jury. Mr. Merwin?

* * * * *

[1998]

(The following proceedings had in open court in the presence of the jury:)
Mr. Merwin: I think we've gotten as far as Mr. Palko's name is my recollection.
The Court: You may proceed.

Bruno Martin Palko,

called as a witness in behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q By Mr. Merwin: Mr. Palko, do you know Bill Payton
A Yes, I do.
Q Where did you meet him?
A Orange County jail.
Q When?
A I believe the last part of '79 or the first part of '80.
Q Were you in the same living area?

A Yes, I was.
Q What area was that?
A Mod-A.
Q How long did you live in the same mod with Bill?
A Approximately a year.
Q Did you contact him every day?
A Yes, I did.
Q Did you talk to him frequently?
A Yes, I did.

[1999]

Q Did you talk to him frequently?
A Yes, I did.
Q Any of those discussions center around religion?
A Yes.
Q On his religious views?
A Yes.
Q On yours?
A Yes.
Q Did he indicate that he had been born again?
A Yes.
Q Did you take him to be sincere?
A Yes, I did.
Q Why?
A When I first met Bill Payton before he was a Christian, he was -- his voice seemed to be more loud, you know, and then after he accepted the Lord, he was very gentle spoken, easy going type person.
Q Did you see his interaction with other inmates during the year that you and he were together?
A Yes, I have.
Q How would you describe that impact on other inmates?
A He was helpful as far as I'm concerned. He was helpful to me and he always, if there was any kind of disturbance in the tank, we would try to -- Bill and myself would try to work out

where the police didn't have to come down and shake down our houses and so on.

[2000]

Q Did he have a calming influence on the other inmates?
A Yes.
Q Where are you located now?
A I'm in Chino Prison.
Q That's state prison as opposed to the jail?
A Yes.
Q Were you convicted of a felony and that's what sent you to state prison?
A Yes, sir.
Q Do you feel Bill Payton would have a positive influence on other inmates in prison?
A Yes, I do.
Mr. Merwin: Nothing further.
Mr. Jacobs No questions.
The Court: Thank you. The witness may be excused. Thank you.
Mr. Merwin: Brian Miller.
The Court: Before you call the witness, excuse the jury for about two minutes at this time.
(The following proceedings had in open court out of the presence of the jury:)
The Court: We're on the record. I do want, so there's no confusion and so forth as far as Mr. Jacobs, you're concerned, in view of testimony that's being elicited, I have no -- as I said, I think it's proper, as I said, as

* * * * *

[2006]

(The following proceedings had in open court in the presence of the jury:)

The Court: Usual stipulation, gentlemen?
Mr. Jacobs: For me. Mr. Merwin is outside.
The Court: Do you want to proceed without him?
The Defendant: No.
The Court: Usual stipulation, Mr. Merwin?
Mr. Merwin: Yes, your Honor.
The Court: All right. You may proceed.
Mr. Merwin: Next witness is Deputy Engen.
Vincent Woodrow Engen,
called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:
The Clerk: State your full name for the record.
The Witness: Vincent Woodrow Engen.
The Clerk: Spell your last name.
The Witness: E-N-G-E-N.

DIRECT EXAMINATION

Q By Mr. Merwin: What is your occupation?
A I'm a deputy sheriff.
Q For the county of Orange?
A Orange County, yes, sir.
Q How long have you been employed by the county of Orange as a deputy sheriff?
A Approximately one year and ten months.
(Continued on page 2007; nothing omitted.)

[2007]

Q And during that period, have you been assigned to the jail?
A Yes, sir.
Q That's the Orange County men's jail?
A Yes, sir.
Q You recognize Bill Payton?
A Yes, sir, I do.

Q When did you first meet Bill Payton?
A About nine, ten months ago.
Q And how did you come to meet Bill Payton?
A I was working as a module deputy for the mod that he's housed in.
Q Now, what is a mod? Maybe you can define that for us?
A A mod is an area inside the jail in which the inmates are housed. They're individual tanks, and they are set up according to an inmate's crimes and his physical stature.
Q And your position relative to Bill's mod was what?
A Module deputy. I run the mod.
Q How many hours a day are you present there running a mod?
A Eight hours a day.
Q How many days a week?
A Five days a week.
Q During that 40-hour span on an average week,

[2008]

how many times did you come into contact with Bill Payton?
A Quite often. I -- it would be impossible to say. But more often then [sic] any other inmate.
Q Have you ever observed any Bible study sessions that Bill Payton was involved in?
A Yes, I have.
Q And where did those occur?
A Inside the vestibule, which -- that's an adjacent cell that leads out into the hallway.
Q Did you participate in any of those yourself?
A No, I didn't.
Q Did you observe Mr. Payton participate in any of those?
A Yes, I did.
Q Did you observe other inmates participating in them?
A Yes, I did.

Q How many other inmates would you say were also involved in some of these sessions?
A A low of four to a high of maybe 12.
Q Did Mr. Payton seem to be leading the Bible study session?
A The majority of the time, yes.
Q How long did these sessions last?
A Between one to three hours.
Q And how many would you say total there were that

[2009]

involved Bible study or Bible discussion?
A I don't understand what you're --
Q How many of these different -- or how many different sessions have you observed?
A I would say probably 15.
Q How many -- I'm sorry, I forgot whether I asked you this. How many other inmates would be involved on an average?
A Between four to twelve.
Q Four to twelve?
A Yeah.
Q Have you ever personally discussed Bill's religious views with him?
A No, I haven't.
Q Do you have an opportunity to observe his interaction with the other inmates apart from these Bible study classes?
A Yes, I do.

(Continued on page 2010; nothing omitted.)

[2010]

Q How do you describe that interaction?
A He gets along very well with the other inmates.
Q Does he seem to have a leadership role with the other inmates?

A Definitely.

Q Would you say his influence with the other inmates you've observed has been positive?

A Yes, sir, I would.

Mr. Merwin: Thank you. I have nothing further.

The Court: You may inquire.

CROSS EXAMINATION

Q By Mr. Jacobs: Yes. How often did you observe these religious meetings, you say every month, once a month or what?

A Approximately two a month.

Q Two a month. And you never participated; is that correct?

A No, sir.

Q In the module, there's upstairs and downstairs?

A Yes, sir, there are.

Q You sit at like a desk; is that correct?

A Yes, sir, I do.

Q Leading in the hallway down the module?

A Yes, sir.

Q You can't see all of the day room activity that goes on in the day room; is that correct?

[2011]

A No, sir. I can see about one-third of it.

Q Did you ever -- while you were in the module, deputy in charge of the defendant's tank, was it ever brought to your attention that Mr. Payton was extracting commissary from other prisoners for phone calls?

A Yes, sir. One time.

Q And was that by another inmate?

A Yes, sir.

Q Now, how is it possible procedurally, how could Mr. Payton get a phone call for another inmate? Is there a procedure that he could follow?

A Well, he was out on the broom, which means he was out cleaning when the other prisoners were in lockdown. He's cleaning up trash and he's the only one that has access to them.

Q Would he have to convince you to give somebody else a phone call for them to get a phone call?

A Yes, in most cases.

Q While you were the module deputy, were there some occasions when Mr. Payton asked you to give phone calls to other prisoners?

A Yes, there were.

Q Did you go ahead and let the other prisoners have phone calls at his request?

A Usually I did.

Mr. Jacobs: Thank you. I have nothing further.

[2012]

REDIRECT EXAMINATION

Q By Mr. Merwin: Were you glad to have Mr. Payton in your module?

A Yes, I was.

Q Why?

A Because of his ability to calm the other inmates.

Q Did Mr. Payton ever come to you and inform you there was a problem developing in that module?

A Yes, he did.

Q Did you take some corrective measure?

A Yes. I was able to head off several problems.

Q As a result of Mr. Payton's statements to you?

A Yes, sir.

Mr. Merwin: I have nothing further.

RECROSS EXAMINATION

Q By Mr. Jacobs: I guess what you're saying, Mr. Payton

would inform you of what other inmates were up to that might lead to problems for you; is that correct?

A Yes.

Q So in other words he would tell you things that other people were doing and you appreciated knowing that; is that correct?

A Yes, sir.

Q And in essence it would get him favors from you like being on the broom for doing that; right?

A Yes, sir.

[2013]

Q Okay. And were you aware while Mr. Payton was in custody that he engaged in two mutual combat situations in the jail.

Mr. Merwin: Objection, assumes facts not in evidence.

The Court: Overruled.

Mr. Merwin: The way he stated the question, I think in effect asserts that it happened.

The Court: I will sustain the objection. You can rephrase it.

Q By Mr. Jacobs: Okay. Were you aware of Mr. Payton ever engaging in mutual combat with other prisoners while you were on duty in the module?

A No, not while I was on duty.

Q From where you're located, if a fight breaks out, you see it all the time?

A Not all the time.

Q Why is that; because of your position?

A Yes, sir.

Q Are fights always brought to your attention in the module immediately, or do you sometimes find out later if never?

A Sometimes never, sometimes hours or even days later.

Mr. Jacobs: Thank you. Nothing further.

FURTHER REDIRECT EXAMINATION

Q By Mr. Merwin: Did you ever see Mr. Payton assist

[2014]

in breaking up a fight?

A No, I didn't.

Q Or prevent one from developing?

A No, I never personally saw that.

Mr. Merwin: Excuse me for just a moment.

Q By Mr. Merwin: Deputy Engen, you testified that an inmate told you that Mr. Payton had asked for or required some kind of extracting some money was the question, in other words, to get a phone call?

A Yes.

Q Is that something that you know of your own knowledge or is that something you were told by an inmate?

A Something I was told by an inmate.

Q And you have one such report?

A Yes, sir.

Mr. Merwin: Thank you. I have nothing further.

Mr. Jacobs: Nothing further.

The Court: All right. Thank you, gentlemen.

Mr. Jacobs: Could I approach the bench for a second?

The Court: Surely.

(Continued on page 2015; nothing omitted.)

[2015]

(Whereupon there was a discussion at the bench among Court and counsel out of the hearing of the jury and reporter.)

The Court: Anything additional, gentlemen?

Mr. Jacobs: No.

Mr. Merwin: No, your Honor. Thank you.

The Court: Thank you, sir. You're excused.

You may call your next witness.
Mr. Merwin: Mrs. Virginia Payton.
The Clerk: Raise your right hand, please.

Virginia Payton,

called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name for the record, please.
The Witness. Virginia Payton.
The Clerk: Would you spell your last name?
The Witness: P-A-Y-T-O-N.
The Clerk: Be seated in the witness stand, please.

DIRECT EXAMINATION

Q By Mr. Merwin: Mrs. Payton, you're Bill Payton's mother?
A Yes.
Q And where do you live?
A In Leisure World. Laguna Hills.
Q With whom?
A My husband.

[2016]

Q He's seated --
A Mason Payton.
Q While Bill has been in the Orange County men's jail, have you been able to visit him there?
A Yes.
Q How often?
A At least every other week.
Q And how long are each of those visits?
A We're only allowed half an hour.
Q And where do those visits occur? Do you know the area of the jail where they occur?
A First floor.

Q You talk on the phone?
A Yes.
Q Through a glass window?
A Yes.
Q On any of these occasions, have you and Bill discussed religion?
A Always. Every occasion.
Q And who brings up the subject?
A Bill.
Q Have you on any of these occasions prayed together?
A Yes.
Q Do you ever bring him any materials to read?
A Yes. He got --
Q What kind --

[2017]

A -- permission --
Q What kind of materials?
A Religion materials.
Q And who suggests the nature of them? Do you select them and bring them or did Bill ask for them and you bring the material?
A That's all he's ever had. That's all he's ever wanted, just religious materials.
Q Have you seen any change in Bill from before he was in the jail to now?
A Oh, yes.
Q How would you describe the change?
A Well, he's totally immersed in the Lord. He -- he's an instrument of the Lord as far as he's concerned. He's a -- he doesn't think of anything else. And he's -- I don't know what else you'd say. He's -- he's always been a fairly calm temperament, but he's very even.
Q Has he told you that he feels he's born again?
A Yes.

Q Or committed?
A Yes, at the beginning, uh-huh.
Q Do you take him to be sincere when he says it?
A Oh, I know it.
Mr. Merwin: I have nothing further. Thank you.
Mr. Jacobs: I don't have any questions.
The Court: Thank you, ma'am. You're excused.

[2018]

You may call your next witness.

Mr. Merwin: I don't have any other witnesses until this afternoon, your Honor.

The Court: Could I see you gentlemen at the bench without the reporter for just a minute?

(Whereupon there was a discussion at the bench among Court and counsel out of the hearing of the jury and reporter.)

The Court: Okay, ladies and gentlemen. What we're going to do is take an early break.

Mr. Merwin: Excuse me, your Honor. Before you dismiss the jury, could I have a brief moment here?

The Court: Sure.

(Discussion between Mr. Merwin and the defendant out of the hearing of the jury and reporter.)

Mr. Merwin: Thank you, your Honor.

(Continued on page 2019; nothing omitted.)

* * * * *

[December 1, 1981]
[2096]

The Court will indicate, all those have been requested by the plaintiff and will be given.

Are there any objections or any problems with regard to those three instructions?

Mr. Merwin: I would like to have 8.84.1 modified by taking paragraph k in CALJIC and rewriting it so it reads as follows: "Any other circumstance which extenuates the gravity of the crime, even though it's not a legal excuse for the crime, including --" and this is language out of 190.3 of the Penal Code, "-- evidence of the defendant's character, background, history, mental condition and physical condition."

The problem I have with it, the way it reads now, is it appears to me that --

Mr. Jacobs: Could I see what you read from?

Mr. Merwin: Yes, section 190.3.

A juror could read that as saying, well, gee, there are a lot of interesting things about Mr. Payton, but they don't have anything to do with the crime. They have something to do with his potential for rehabilitation or his character or his background, but they don't have anything to do with the crime itself and I know that the legislation, 190.3 was designed with the view toward including evidence of background character, whatever it was offered by the defense to extenuate the gravity of the situation more than the gravity of the crime.

[2097]

Mr. Jacobs: I think with the defendant's character, background, history, mental condition and physical condition, they're talking about his -- the other areas, "g," whether he was under extreme duress, whether or not he had -- "d," whether he had a mental -- extreme mental or emotional disturbance and I think "k," unlike the way Mr. Merwin wants to change it, any other circumstance which extenuates the gravity of the crime, even though it's not a legal excuse for the crime, they're probably talking about circumstances attending the crime. They're not talking about character, background, history, mental condition and physical condition, and I think his character, background, history, mental condition, physical -- mental

condition, physical condition are supposed to come in under other areas, not under "k."

Mr. Merwin: Seems to me the other areas that touch on --

Mr. Jacobs: I think Mr. Merwin can argue that we had presented this under "k," but it's not what " k" says either in the statute or CALJIC.

The Court: Let's look at our most recent -- when was 190.3 passed, or the last time? What are we looking at?

Mr. Jacobs: It says added November 7, '78.

The Court: November, '78. Okay. And we're talking about 8.84.1.

Mr. Jacobs: You want the Code section he's reading from?

[2098]

The Court: No. I'm looking, as I said -- okay. We have -- I'm looking at CALJIC '81 supplement and to see, as I said, if they've added anything at all which would expand or change in any way and put any language requested by Mr. Merwin in this particular case, and I'm looking at 1980, see if we have anything, any modifications in this.

Mr. Jacobs: I think what they're --

The Court: We have 8.84, penalty trial, indicating that if the defendant were a minor, which doesn't have anything to do with what we're doing. When was -- I'm looking at the fourth edition.

Mr. Jacobs: This is the '81 supplement and --

The Court: I'm looking at the --

Mr. Jacobs: '78 statute, though.

The Court: Well, the thing I'm puzzled with, as I say, looking at 190.3 which is passed, what, in --

Mr. Jacobs: '78.

The Court: -- '78, and they have had, as I said, the supplements each year and we've had no change through '81 in the supplement. Mr. Merwin, that's the thing. As I said, I'm somewhat concerned with the fact they don't spell it out when

they give us the ten factors If, in fact, we should include more of the language of 190.3.

Mr. Jacobs: I don't think there's any ambiguity because those -- his history, his character, mental condition and physical condition would come in to play under other categories,

[2099]

specifically "d," "g," and "h."

The Court: "D" picks up part of it.

Mr. Jacobs: Then "g" and "h," but I don't think that's at all what they mean by "k." I don't think his background or character has anything to do with "k" because if it did, they'd say it. They'd say a circumstance.

The Court: Let me see the code section.

Mr. Jacobs: It's the same as CALJIC.

Mr. Merwin: While you're reading and considering that, I also want to request there be an "l" added which says they may take into consideration the defendant's potential for rehabilitation.

The Court: Well, with regard to "l," of course --

(Continued on page 2100; nothing omitted.)

[2100]

Mr. Jacobs: You want your argument to become the law? Is that what you're trying to do?

The Court: Well, as I said, that will be denied. I don't have any problem with denying "l."

Mr. Jacobs: Can my argument become the law, too?

The Court: I don't think, as I said, with regard to the situation where we have the factors set forth that the Court's going to start adding categories. I'll deny that request for "l."

I'm back to reading the 190.3, of course, where they go ahead and completely define 190.3 in toto, and then I assume 190.3 -- and I haven't checked it out --

Mr. Jacobs: It's verbatim.
The Court: Verbatim.
I assume CALJIC 8.84.1 --
Mr. Jacobs: That's it.
The Court: -- is a complete lifting, the factors "a" through " k." And with regard to your request to add the language: defendant's character, background, history, mental condition and physical condition, I assume, as I said, that the legislatures [sic] assume that they had picked that up on "a" through "k." I assume that's the People's argument.
Mr. Jacobs: I think to add what Mr. Merwin wants to add would be directly contrary to what they have in "k." That's to add -- that's, in essence, to create another "l," to adjust pointblank [sic] character, background, history.

[2101]

That's not what they meant. They meant what they have in "d," "g" and the other ones. It has to be something about his background or history that relates to something they felt was important.

And I think -- I read "k" as being a circumstance attending a crime. That's the way I read it. Not a factor and background, the defendant's history; or else the Legislature would have said that.

The Court: Well, I assume, as I said -- and believe me, this is my interpretation -- but I assume, as I said, from "k," the "any other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime," that they are incorporating from paragraph 1, as I said, that the defendant's character, background, history, mental condition and physical condition may, as I said, be applicable through "k."

I didn't draft it. I'm reluctant, as I said, to, this particular case, change a CALJIC instruction wherein it's verbatim from the 190.3 statute, Mr. Merwin.

I certainly see what your argument is directed towards. And I certainly would assume that you are -- you argue those particular factors, it's clearly proper argument as included under "k."

I see your position for the edification and clarification of the jury. But I'm going to refuse, as I said, to modify the instruction. I think, as I said, that

[2102]

it's clear what was intended.

I assume you gentlemen, as I said, in your argument can certainly relate -- relate back to those factors and certainly can argue the defendant's character, background, history, mental condition, physical condition; certainly fall into category "k" and certainly make a clear argument to the jury.

Mr. Merwin: The only problem I have with that is that "k," at least taken at face value, refers to extenuating the gravity of the crime, even though it's not a legal excuse for the crime. It doesn't sound to me like "k" incorporates the other factors, even though I'm sure that was the intent of the Legislature.
Mr. Jacobs: I don't think it was.
Mr. Merwin: That that be something that the defense can offer.
The Court: Well, -- he's -- I think he's stuck if that -- we're arguing that that's applicable
Mr. Jacobs: I think. I don't think it is. But I think he's stuck with trying to argue it. I don't think we should take his argument and make it the law.
Mr. Merwin: Is the Court going to preclude me from arguing rehabilitation or --
The Court: No.
Mr. Jacobs: Argue anything you want.

[2103]

Mr. Merwin: As applying or being subsumed within "k."

The Court: I assume that any other circumstance is -- which extenuates the gravity of the crime is a -- and I may be wrong -- but I assume that's the catch-all, and it was intended, as I said, for all these factors, as I said, that don't fall into the other areas. And I realize there is a carry-over that some of these could be argued in a different category.

But I think the way I read the cases -- and there isn't much case law -- and the way I read "k," I think, as I said, it's wide open. I found no -- you know, within reason, as I said, it seems to me, as I said, that those areas are certainly open for argument.

I certainly am not going to preclude it, your arguing that. I think, as I said, that the reason "k" doesn't include character, background, history, mental condition and physical condition is that they aren't limiting necessarily to that "k" as sort of a no-holds barred within proper restrictions. The way I read the cases, it's almost anything can come in on behalf of the defendant, be argued. And I think, as I said, that's probably one of the reasons I haven't specifically tried to limit "k" with the language that you want because you're also expanding, want to request "l," and I think that's the reason, as I said, that they haven't put in -- or been more delineating in "k" is because you -- the factors that you're arguing in "l" I think can

[2104]

be included in "k."

And if we use the language that you want in "k," then we have to in fact -- we're going to be that definitive adding "l." So I think "k" is the all encompassing one that includes both what you want added in your argument for "l," which is basically why I'm not giving it, so . . .

Mr. Merwin: One last observation.

The Court: Sure.

Mr. Merwin: My only problem is I think we all agree that that's the law, but the jury's not going to know.

The Court: I agree with you. Probably as I said from your standpoint, I'm not quarreling with -- if I were in your position -- that you would like to add those -- particular language: character, background, history, mental condition, so forth in "k" and add an "l." And I think, as I said, it would be certainly -- I would be making the same request.

But I'm going to deny it, and for the reasons stated.

(Continued on page 2105; nothing omitted.)

[2105]

Anything else, gentlemen?

Mr. Merwin: This doesn't relate to a jury instruction.

The Court: Anything else? I think we're set on the instructions, so I'm sure -- would you make sure I have mine and the concluding instruction, I think, as I said, as modified is proper and you gentlemen reviewed that, so --

Mr. Merwin: I do think that we ought to specifically give the instruction on corpus because the only evidence in the record that relates to extracting money for phone calls is a hearsay statement which was not even proven to be true and that -- in that regard there's another way to solve that problem. Maybe what we could do is this. When that came in, it took me by surprise for two reasons. One is, I thought there was an understanding, an existing court order that before that question was asked of any witness, that we'd have a 402 hearing. That's the way we handled every previous witness when that issue was going to be asked.

So it was asked and the answer was in before I really had a chance to object, even though it was obvious hearsay and I didn't want to make a delayed objection for fear it would bring knowledge to it.

Now, we have a note from Sharon Gruber dated today, "the prosecution mentioned extracting money for phone calls.

Please ask him to explain what that means."

It's obvious that did not escape the attention of the jury, just because I didn't object to it and bring

* * * * *

[2113]

(The following proceedings had in open court in the presence of the jury:)

The Court: Good morning, ladies and gentlemen. Usual stipulation?

Mr. Jacobs: Yes.

Mr. Merwin: Yes, your Honor.

The Court: I think you gentlemen had one stipulation before you argued?

Mr. Jacobs: We are willing to stipulate to the defendant's age.

Mr. Merwin: Yes. We have stipulated he's 28 years old.

The Court: Stipulation will be accepted.

With that in mind, the People may make their opening statement. I do want to indicate, as I did at the prior -- at the guilt phase of this proceeding, that the argument of counsel is not evidence and you gentlemen and ladies should rely on your own recollection of the evidence, and if it isn't as you recall, strictly inadvertance [sic] on the part of both of these gentlemen, so with that in mind, rely on your own recollection. This is not evidence but argument. You may proceed, Mr. Jacobs.

(Continued on page 2114; nothing omitted.)

[2114]

Mr. Jacobs: Thank you. At this time, ladies and gentlemen, I'd like to thank all of you for your close attention throughout the trial.

At this point, before the end of the second stage, the last stage of the trial, it's again my opportunity, my last opportunity

to address you on the evidence in what's referred to as closing argument.

In this, what I have to say to you again, I'm going to basically break up what I have to say into two parts. I'm going to talk to you a little bit about the law, which is going to be very brief.

And then I'm going to talk to you about the facts and about the death penalty.

Unlike the argument at the guilt phase, there is no moving party or no party with a burden. I am not going to have a second chance or second opportunity to address you.

Each side in this proceeding will be giving just one argument. So I'm going to argue first, and then Mr. Merwin will have a chance to make his statements to you.

And then you're going to be instructed on the law, and then the case is going to be submitted to you.

As I said, first thing I want to do -- and it's going to take just a few minutes -- is I want to run through the CALJIC or the jury instructions you're going to get, and then I'm going to talk about the facts of the case and

[2115]

the penalties involved.

I'm going to try not to repeat anything I said to you about the facts of the case in the guilt phase. However, I am going to refer with a different viewpoint perhaps and get back and talk to the facts and circumstances of the crime because as you're going to see, that is a very important factor for you to consider in this stage of the trial.

To begin with, in essence, and I'm summarizing and skipping, you're going to be instructed by the Court at the conclusion of argument that it is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special

circumstances charged in the case have been specially found to be true.

And that's why we're here. That's why we're in the second stage.

(Continued on page 2116; nothing omitted.)

[2116]

You then are going to be instructed as follows, and this has to do with the eleven factors that you've heard about from the beginning back when we had jury selection, and you're going to be instructed in essence as follows. I'm going to go through them very quickly and then I'm going to talk them again and apply them to the facts, so you don't need to take notes and the Court's going to give them to you and you will have them in the jury room.

In determining which penalty is to be imposed upon the defendant, you should consider all the evidence which has been received during any part of the trial of this case. You should take into account and be guided by the following factors:

"A," the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true. In other words, all the evidence you heard in the guilt phase.

"B," the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or expressed or implied force to use violence.

"C," the presence or absence of any prior felony conviction.

"D," whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

[2117]

"E," whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"F," whether or not the offenses committed [sic] under circumstances which the defendant reasonably believed to be moral justification or extenuation for his conduct.

"G," whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"H," whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or effects of intoxication.

"I," the age of the defendant at the time of the crime.

"J," whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"K," any other circumstance which extenuates the gravity of the crime, even though it's not a legal excuse for the crime.

As you can all see from my very quick reading, I'm going to go over them, some of these are applicable and some of them are not, depending on your findings.

I'm going to get back to those and discuss with

[2118]

you the evidence in some detail, but before I do that then you'll be read the final and concluding instruction on what you do with these factors.

It would be your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole shall be imposed upon this defendant.

After having heard all the evidence and after having heard and considered the arguments of counsel, you shall consider,

take into account and be guided by the applicable factors of aggravating and mitigated circumstances upon which you have been instructed.

In other words, the factors I have just read to you.

If you should conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

So, as I've just told you and as we talked about in voir dire, it's a weighing process as far as determining the penalty that you should impose, the jury is expected or supposed to go through a weighing process of the factors I have just described.

Now, in argument I considered putting those eleven

[2119]

factors on the board and showing which ones were applicable and then perhaps to aid you in weighing and, say, take a thousand points and distribute them over the factors.

In view of the subject, what we're talking about, the death penalty, the type of the case, I decided that wasn't really appropriate or necessary and I think your too intelligent for me to have to do that.

(Continued on page 2120; nothing omitted.)

[2120]

Basically, the facts of the case and what this defendant has been convicted of doing is the primary thing I'm going to talk to you about. And what the appropriate penalty for what he did should be.

Before I do that, I want to go back and go through those factors very briefly and comment to you -- at least tell you which ones seem to be applicable and which ones do not.

Okay. "A." The circumstances of the crime, the special circumstances, what the defendant did to Mrs. Montgomery, that is certainly applicable and an aggravating factor that should be entitled to great weight.

"B," the presence of other criminal conduct showing force or violence. Well, we have the facts involving the stabbing of the two Pensingers, and we have the evidence you heard having to do with Mrs. Stone. That also is an applicable factor that should be entitled to weight.

"C," prior felony convictions. We have two felony convictions in 1976, so that is applicable. And it's an aggravating factor. He had possession of controlled substance and statutory rape, both in 1976.

"D," whether the defendant was under extreme mental or emotional distress. Haven't heard any evidence on it. I'd submit it's not applicable.

"E," whether the victim participated in defendant's homicidal conduct. That's clearly not the case. That's

[2121]

not applicable either.

"F," did the defendant have reasonable belief or moral justification in what he did? That's clearly not applicable.

"G," was defendant acting under extreme duress or domination of another? Haven't heard any evidence as to that. That's not applicable.

"H," was the defendant impaired by a mental disease preventing him from conforming his conduct to the requirements of the law? We have heard no evidence of defendant's mental disease. That also would not be applicable.

"I," defendant's age. Twenty-eight? I guess that's applicable. Some of you might consider that not to be a factor. Some of you might consider that young, to be somewhat mitigating.

"J," was defendant merely an accomplice? That's not applicable. He was not an accomplice. He was the perpetrator.

And "k." In any other circumstance which extenuates or lessens the gravity of the crime. I want to stop and talk to you about "k" for just a second because -- and go over the wording.

"K" says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some fact -- okay? -- some factor at the

[2122]

time of the offense that somehow operates to reduce the gravity for what the defendant did.

It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity.

Mr. Merwin: Excuse me, your Honor.

Mr. Jacobs: And how the defendant --

Mr. Merwin: I'm sorry to interrupt. Could we approach the bench?

The Court: Surely.

Mr. Merwin: With the reporter.

(The following proceedings had among court and counsel at the bench out of the hearing of the jury:)

Mr. Merwin: I don't know if the Court heard that part of the argument, but I think that's completely contrary to what we all agreed in chambers on the record "k" was designed to apply to.

And I think this justifies a mistrial and move for a mistrial right now on prosecutorial misconduct.

Mr. Jacobs: He's wrong.

Mr. Merwin: Maybe the Court ought to have that portion reread.

The Court: Well, as I understand the comments of the prosecutor is that they feel that the religious aspect of this as far as being a mitigating factor does not apply because

[2123]

it took place after the crime. Is that your position, Mr. Jacobs?

Mr. Jacobs: Yeah, it doesn't read into "k."

There's no way it says it has to extenuate the gravity of the crime. If he wants to argue it does, that's his problem. But it doesn't.

Mr. Merwin: I thought we'd agreed that that was the only reason for not giving the --

The Court: I think the -- well, the Court indicated, as I said, that -- I assumed in "k" that you were going to argue this was -- you know, goes to his background, rehabilitation and so forth. I think, as I said, it's a fair comment on either side, as I said. What his position is is [sic] that -- the argument of the People is that --. Well, I think you can argue it either way, gentlemen. As I said, I'm just going to indicate to the jurors, as I said, that again, the general comment, this is not evidence.

Mr. Jacobs: I don't want you to indicate anything because it's permissible argument. I think he's misinterpreting the law, and I just want to argue my case.

The Court: Well, --

Mr. Merwin: Then I'd like to renew the request to modify the instruction to add the language from 190.3.

The Court: Well, I'd decline to do that at this time. I think you gentlemen are entitled to argue that under "k," that you can make that argument either way. So again, I'm just going to indicate to the jury that that – what you

[2124]

gentlemen say is not evidence, and I'll not admonish them in any respect.

(The following proceedings had in open court in the presence of the jury:)

The Court: Indicate to you, ladies and gentlemen, again I want to emphasize to you that the comments by both the

prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument. And it's to be placed in its proper perspective.

So with that in mind, you may continue, Mr. Jacobs

Mr. Jacobs: Thank you.

(Continued on page 2125; nothing omitted.)

[2125]

Referring back to "k" which I was talking about, any other circumstance which extenuates or lessens the gravity of the crime, the only defense evidence you've heard had to do with defendant's new Christianity and that he helped the module deputies in the jail while he was in custody.

The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed.

Mr. Merwin will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that can happen when -- under any other circumstance which extenuates or lessens the gravity of the crime, refers -- seems to refer to a fact in operation at the time of the offense.

What I am getting at, you have not heard during the past few days any legal evidence mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all.

You have not heard any evidence of mitigation in this trial.

I want to talk to you about the facts of the case and the death penalty. I have gone over with you the factors and I'm not going to spend too much time on the factors except for the first one.

[2126]

The defendant in this case deserves the death penalty not for his felony priors, not for stabbing Mrs. Stone, not even for stabbing Mrs. Pensinger 40 times and her son 23 times. Those acts may operate to seal the defendant's fate and to tell us what kind of person he is. But what he deserves the death penalty for is what he did to Mrs. Montgomery.

If that was all the evidence we had, if all the evidence before you were the crimes and the act to Mrs. Montgomery, that in itself should warrant the death penalty.

I'm going to talk about the death of Mrs. Montgomery and the evidence you heard regarding what exactly the defendant did to her. I'm going to talk to it a little bit differently, little bit more graphically than I did in the guilt phase because there was a different issue there.

The issue there was whether it was first degree murder and special circumstances, and I'm going to talk to you a little more graphically now, even though it's not pleasant, that what the defendant did to that woman, because it should be said.

The photographs of Mrs. Montgomery at the scene depicting something that must be very difficult for all of us to view, depicts the face of death on the victim, of a very violent killing. I'm sure, especially for those of you who have never seen it before, that's something very hard to look at, and those photographs seem particularly

[2127]

pathetic and horrible when viewing a young, pretty woman who was cut down when -- before she ever really had a chance to live and there was no reason for her to die.

Dr. Yatar, the autopsy surgeon, put it well in describing her death when he said her wounds would be fatal in ten minutes, shock and unconsciousness would take place in about five minutes and by then she could no longer resist and then

quote from him, he said, "the victim would very slowly bleed to death."

So from the evidence, and this is difficult to talk about, but I think it's very clear what was happening to Mrs. Montgomery as she lay dying in her own blood during that ten-minute period.

Well, it seems in all likelihood the defendant was still stabbing her. She probably still resisted as long as she could, from the nail marks on the defendant's back, from the knife wounds on her hands and legs.

The worst part, though, from the bloodstains on her thighs and hips makes it very obvious that the defendant's body was still pressed up against her and he was still engaged in sexual intercourse with her even as she lay dying.

If that's not bad enough, and some of you may recall the evidence from the guilt phase, some of you may have asked yourselves where did the large amount of blood on the defendant's mouth and face come from, which his wife saw when he came home that morning.

[2128]

You may recall other evidence shows that there was saliva on the victim's left breast. All significant large amounts of blood, as you can see on the photographs of Mrs. -- on Mrs. Montgomery's body are from the waist down.

So, ladies and gentlemen, here we have a defendant who feeds on the blood of his victim while she is lying dying and this is the type of case and the type of defendant that the death penalty was designed for.

Here also is a defendant who in his words to Alex Garcia has a "urge to kill" and why should we give a defendant to [sic] feed that urge again. Even when he -- if in prison, what if Mr. Payton gets that urge to kill, if he sees the back of a prison guard again.

Here's a defendant who views all women as his potential victims, who wants to rape and stab them. Why should we give this defendant another chance of finding another victim.

The people through the Legislature have enacted the death penalty statute and you, as representatives of society get to decide if this defendant and this type of crime deserves the utmost penalty.

I suppose somewhere there must be a line between what is just a crime or just a murder, if you'll excuse the expression "just," and what is an atrocity, and this case is an atrocity and I don't think the defense will even refute that.

[2129]

For what the defendant did to Mrs. Montgomery, he deserves the death penalty, and there is nothing that I could think of that could conceivably mitigate this type of murder.

To vote for life without possibility of parole in this case is to say that somewhere there are mitigating factors that outweigh the aggravating and outrageous factors of what the defendant did, and you've heard no evidence of any mitigating factors.

Is this a mitigated murder? Do the facts and the defendant's participation in what he did that mitigated.

If you return a verdict of life without possibility of parole, that is what you would be saying, that this is a mitigated killing.

I want to make a few comments about religion, the only evidence put on by the defendant. I don't really want to spend too much time on it because I don't think it's really applicable and I don't think it comes under any of the eleven factors, and I certainly don't mean to demean a religion by any way in what I say.

(Continued on page 2130; nothing omitted.)

[2130]

I don't think that religion was meant to be a use -- to be used as a shield to hide behind for what you've done or to whitewash what you've done, and I'd like to point out -- I'm sure all of you are aware -- everybody seems to get religion in jail when facing the death penalty.

State prison is full of people who get religion when they are in jail. Just like the defendant's witnesses.

The other evidence that the defense has is they call Miss Seglie, and she reads us excerpts from the defendant's autobiography offered to show the style. Okay? So this is supposed to show the defendant's intelligence, his sensitivity, how smart he is. And you're supposed to be impressed and moved because he can write these moving paragraphs.

And what does he write about? Okay? Here he rapes a girl, kills her, tries to kill two other people, he runs off to Florida and he sits with his feet in the sand and the eyes in (sic) the ocean, writing about his -- his feelings, and he's going to write his memoirs and his autobiography. And life is very tough for a fugitive rapist/murderer. While Miss Seglie was reading these nice excerpts, you know what I was thinking about? I was thinking about Miss [sic] Montgomery. Okay?

How about Mrs. Montgomery? She's never going to be able to put her feet in the sand. She's never going to be able to look out at the ocean. She's never going to be able to be with her husband again. And why not? Because

[2131]

the defendant slaughtered her, like an animal. That's why not.

So after he finishes what he does to her and runs off to Florida and he gets caught, then he becomes a newborn Christian, after he's in custody.

And there's a good reason why he becomes a Christian after he gets in custody. And that is, he has no remorse for what

he did to Mrs. Montgomery. The only remorse he has is for his own situation. That's why he doesn't get religion until after he's caught. New found religion can't whitewash or change the past.

I just have a few more concluding remarks. Mr. Merwin is a very fine trial attorney. And he will urge you in essence setting aside or ignoring the facts to spare his client the ultimate penalty and not to execute him because now he's a good Christian, maybe, and he helps the module deputy and he is a leader of inmates in jail.

And I suppose that there must be something moving about a man asking for mercy, regardless of what the man he represents has done.

Before we listen to the pleas of mercy from this defendant, maybe we should think about the victim. Did the defendant show her mercy? The poor woman was raped probably at least twice and stabbed 12 times.

You don't think she begged for mercy? What mercy did the defendant show her? If she didn't ask for mercy

[2132]

verbally, you don't think she cried out for mercy with her eyes or her body?

And what was the defendant's reaction to her pleas for mercy? And what does he do after he finishes with that victim?

He picks up the knife and only bending the blade prevents him from killing two more people the same morning.

I ask you to ask yourselves: Is this the type of defendant from whom we should listen to pleas for mercy?

Mr. Merwin will tell you this is a defendant who can be rehabilitated because he's a good Christian and he helps the module deputy.

In 1973, he stabbed Mrs. Stone. In 1976, he was convicted of two felony convictions. In 1981, he rapes and murders a girl and tries to kill two other people. You think he's going to be rehabilitated?

The law in its simplicity is that the aggravating -- if the aggravating factors outweigh the mitigating, the sentence the jury should vote for should be the death penalty.

How do the factors line up? The circumstances and facts of the case, the defendant's other acts showing violence, Mrs. Pensinger and Mrs. Stone, her -- Blane [sic] Pensinger, the defendant's two prior convictions line up against really nothing except defendant's newborn Christianity and the fact that he's 28 years old. This is not close.

You haven't heard anything to mitigate what he's

[2133]

done. If you wanted to distribute a thousand points over the factors, 900 would have to go to what he did to Mrs. Montgomery, and I really doubt if Mr. Merwin would dispute that breakdown of the facts.

I don't suppose it's very easy for anyone to vote for the death penalty in any case. What Mr. Payton did in the small house in Garden Grove, May 26, 1980, under the law of the state of California, he has forfeited whatever right he has to live. To anyone who believes that the death penalty has any place at all in our society, that is the only just and fair result.

To vote for the death penalty in this case's decision, all of you should be able to live with today, tomorrow, next week and 20 years from now.

Jury selection, I asked each of you in the form of a hypothetical question: If the aggravating factors outweigh the mitigating, could you vote for the death penalty? All of you said you could.

Just as in the hypothetical, I ask you, the actual time to make that decision now is here.

I ask each of you at this time in upholding the law that each of you have sworn to enforce to return a verdict sentencing Mr. Payton to the death penalty.

Thank you.

(Continued on page 2134; nothing omitted.)

[2134]

The Court: Mr. Merwin.

Mr. Merwin: Could we have about five minutes, your Honor?

The Court: Sure.

Mr. Merwin: Thank you.

The Court: Ladies and gentlemen, we will take a five-minute break, please.

(Morning recess.)

(The following proceedings had in open court in the presence of the jury:)

The Court: Usual stipulation, gentlemen?

Mr. Merwin: Yes, your Honor.

The Court: You may proceed.

Mr. Merwin: Ladies and gentlemen, I was going to begin by reading some excerpts out of the CALJIC or the instructions that we all operate by, but I don't think that is necessary. They have been read to you once and I'll repeat the various factors and the language of the law as we come to this individually.

Before I get to the remarks I prepared, I'd like to make a few comments about the argument we have just heard.

First, there are portions of it with which I agree. I agree that many of the factors, and you'll see, as I go through them, are just plain not applicable.

The law says take into account, be guided by and consider the following factors if applicable. I agree with

[2135]

that observation.

I think some of the other observations in terms of what the evidence shows are exaggerations or perhaps deliberate efforts to inflame you to reach a verdict that is not based on the evidence, and that, of course, offends me.

I think the comment about blood on the face leading inevitably to the fact that he is basically a vampire is just a fabrication. How do we know?

We know there's blood on his hands. We know that he has hands. We know that his hands touched blood. We know that hands go to the face. We also know the bathroom right across the room was used, so why are we led inescapably to the conclusion the prosecutor wants you to adopt that he was a vampire. I think that is ridiculous.

(Continued on page 2136; nothing omitted.)

[2136]

There's another comment that I think offended me even worse, and I think possibly offends a lot of us, and that was the lighthearted, almost forthy [sic] way in which Mr. Payton's religion is being treated. Almost as if that's a copout.

And I don't see how anybody in this room having heard the evidence that they heard could say that in Mr. Payton's case that's the case. It is just not the case. No witnesses were offered to show that that wasn't a sincere belief.

We put on eight or nine or ten, all of whom agreed; the evidence indicates it is; the best evidence of his sincerity is what he's done since he reached the jail. Not his expressed views or the testimony of the other inmates. He's done a lot of things -- and I'll cover that in a minute -- which demonstrate by deed that he's sincere.

One last thing I didn't agree with, and that is the final or the applicability of the final criterion, "k." I want to talk about that in a minute when I get to that.

I think if you take a look at this chart that I've prepared, it will suggest an approach, and that's what I really want it for, that I suggest you use in analyzing the evidence and in trying to apply the law of these eleven factors to the evidence that's been presented.

Let me go through with this first in general, suggest the approach, and then show you where the prosecutor

[2137]

and I agree and disagree and how I think you ought to resolve these issues.

First I listed the factors, and I did not spell them out. That's why I want to read them to you as we go through them. I just gave you sort of a paraphrase or a thumbnail version of what each factor entailed.

And then the next column was "applicable" which is a question mark. You first have to look at the factor that's being discussed and decide in your own mind whether that factor is applicable to the facts of our case.

On most of these, you'll see as I go through it the prosecutor and I agree.

If you decide that a factor is not applicable, then just forget the rest. It has no bearing on the case. It just was designed or intended to apply to some other kind of factual situation.

If you decide that it is applicable, then you have to ask yourself whether that factor is mitigating or whether it's aggravating. And if so, what weight is that factor entitled to?

I want to go through the ones that are applicable with you on this in a minute.

The first criterion or the first factor that you're required to consider -- and I'll read it to you, but I disagree to the circumstances -- is described as the circumstances of the crime of which the defendant was convicted

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in the present proceeding and the existence of any special circumstance or circumstances found to be true.

The question is not whether it's applicable. It's obviously applicable. In every case of special circumstances you're not

only entitled to but you're in essence required to consider the facts of the case. They are obviously relevant.

The question is: Is it aggravating, is it mitigating, and what weight should be given to it.

Now, you may find it hard to believe that I could put a question under aggravating or mitigating. The problem, here we're not using a layman's definition. The facts are not only aggravating in that sense. That they upset us, they are nauseating in part. That's not the definition. That's not the purpose. It's not why you ask that question, and it's not how you answer it.

(Continued on page 2139; nothing omitted.)

[2139]

The question means whether it's aggravating, whether or not the facts of this case set it apart from another first degree murder during the commission of a rape, to distinguish this in terms of the penalty that ought to be imposed. So we're not doing it in a vacuum.

Now, you have a different perspective than probably everyone else in this room. Each one of you does individually because you know from your own past and your own exposure to the press and other cases, some facts about some other cases.

You don't know and probably you're not in a very good position to determine whether this is more aggravated than one that might be tried down the hall or downstairs or somewhere else. The question is not whether the facts are aggravating in a personal sense, but how aggravating is this. Is it really set apart from any other first degree murder committed during the commission of rape or attempt to commit rape.

I think if you think back on all the cases we're all familiar with --

Mr. Jacobs: I think I have to object, your Honor. That's not the law.

Mr. Merwin: That is the law.

Mr. Jacobs: It's not.

The Court: Again, I will admonish the jury this is an argument by counsel. You heard the evidence. You will

[2140]

be instructed on the law. I think that will take care of it, ladies and gentlemen, so with that admonition, you may continue.

Mr. Merwin: Let's think about that and see if that objection makes any sense.

It doesn't make any sense it's just aggravated compared to petty theft or aggravated compared to a rape which is not involved in a murder, or is this aggravated compared to a murder that is not committed during the commission of a rape?

The only question that makes any sense and the reason that question is there, is it aggravated compared to another first degree murder committed during the commission of a rape or attempt to commit rape. That's the context and how you judge the facts and whether you find them in that setting to be aggravated, I'm not trying to tell you. Maybe you will. I know they are offensive. We've all sat and listened to it and I think if you remember Mr. Payton asked for a recess during the testimony of the autopsy surgeon.

Mr. Jacobs: Your Honor, that's not in evidence.

Mr. Merwin: It's offensive to us all.

Mr. Jacobs: I'll object. That is not in evidence. That's improper argument.

The Court: Again, ladies and gentlemen, I will admonish you, as I said, at this particular time is the reason I admonish you, ladies and gentlemen. As I said, statements of counsel

[2141]

are not in any way evidence and you ladies and gentlemen will recall the evidence, I'm sure, better than the attorneys or the Court. You've heard it all and, as I said -- so again, you rely on

your own recollection as to what the evidence is and discard the comments of counsel. It is not evidence.

And with that admonition, as I say, you may proceed Mr. Merwin.

Mr. Merwin: Thank you.

Second factor is defined as follows, the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

There is evidence of that in this case. That's why I said that's applicable and that's something you have to weigh and you have to decide whether or not that other evidence taken in the big picture is an aggravating or mitigating circumstance.

For example, let's talk about the stabbing of Patty Stone in the middle of the night.

On the one hand it's obviously aggravating. It's a violent assault on someone else under circumstances somewhat similar to the instant case, or the case we're dealing with. But on the other hand, I think it illustrates the point that I was trying to make at the end of the penalty phase, and that is that this had to be a mindless, thoughtless, although equally senseless crime.

[2142]

The prosecution's response, if you recall, is no, he was there to rape and then he wanted to kill the victim. That obviously doesn't apply if you analyze or try to analyze or compare the two cases.

Think about Stone. There was no attempt to commit rape. That wasn't for the purpose of rape. It wasn't for any sexual purpose, that was explained. It wasn't for any purpose.

Exactly our position on the underlying case is the position I think that is amply demonstrated by the Stone killing -- the Stone stabbing, I'm sorry, and that is it was senseless, obviously. It was followed or preceded by some kind of a break. We don't have evidence to establish what kind or what kind of

psychiatric problem generated that stabbing, but it's the only reasonable explanation of the evidence.

So whether or not you consider the Stone case or the Stone incident an aggravating or mitigating circumstance I think is arguable. I think it does put the current case in a different light or it puts it in an aggravating light or mitigating light I leave it to your judgment, but it's not at all obvious, although Mr. -- or the prosecutor would certainly like you to believe that. It's not obvious to me.

Third one is presence or absence of felony convictions. I put it's applicable because we have evidence

[2143]

of two prior felony convictions, but whether or not that is mitigating or aggravating, I submit, is not at all obvious.

The reason for that is neither one is a violent crime. One of them is consensual, unlawful sex with someone under the age of 18. That is not a violent crime. That is not even something directly related to the type of case we're talking about.

The other felony conviction is for possession for more than three ounces of marijuana; hardly an aggravating circumstance in either case. Maybe applicable, but I don't think it is aggravating, or if it is aggravating, if that's your judgment, it's entitled to about zero or nil weight in the kind of decision you are making now.

The next category is the one where I agree with Mr. Jacobs, is whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

I think we could perhaps speculate that was the situation because the acts were irrational. I agree that factor is inapplicable. Therefore, having reached that, you don't need to weigh it. You don't need to decide whether a nonexisting fact or factor is applicable -- pardon me, entitled to much weight at all. It's just not involved in the case.

The next criterion, which is "e," is whether or not the offense was committed under circumstances which

[2144]

the defendant reasonably believed to be a moral justification or extenuation for his conduct.

I agree with the prosecutor on that, that was not applicable.

The next one is -- I've gotten one out of order here -- "e," whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. That is obviously not applicable. That was designed for the situation where you are playing Russian roulette or where someone is perhaps very sick, critically ill and asks to be killed, and that's the kind of case that it was designed for. It's just not applicable to ours. And we agree, on that.

The next is whether or not the defendant acted under extreme duress or under substantial domination of another person. This is more the situation where a husband forces a wife that he's been beating for years into killing a child or something of that nature.

(Continued on page 2145; nothing omitted.)

[2145]

Just don't apply to the facts of our case. So you don't need to worry whether it's aggravating or mitigating or what weight is it entitled to.

The next is whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defects or the effects of intoxication.

Now, the psychiatric testimony -- psychiatric testimony was not presented. So there's no direct evidence on that. There's

considerable circumstantial evidence on that. And I don't see how anybody can reach the conclusion that this stabbing death was a result of anything other than (snapping fingers) some kind of a psychiatric disorder that manifested itself under pressure at the time.

I don't think you need a psychiatrist to come in and tell you that and explain his credentials and tell you about psychiatry to draw the obvious inference, and that's that due to some psychiatric problem or some defect, Mr. Payton –

Mr. Jacobs: Well, excuse me. I have to object to this because there's no evidence whatsoever.

Mr. Merwin: There is evidence of it.

Mr. Jacobs: Of psychiatric testimony. Speaking hypothetically; it's the same thing.

Mr. Merwin: I don't think you have to present direct

[2146]

psychiatric testimony to argue the relevance of the facts.

The Court: Ladies and gentlemen, again, as I said, this is a situation where I'm going to have you rely on your own recollection of the evidence. You heard all of the testimony in both the guilt and at the penalty phase.

And as I said, it's my position and argument that it is just argument. And for us to try and recall between the attorneys and the Court what was said and what was not said would probably end up that all three of us would be in error. So you have 12 of you who will be in the jury room, and you'll recall the evidence. You can evaluate it.

If there's any question in your mind, as I said, you have a right to come in and request that any testimony be read back if you aren't clear on what the testimony was.

So again, with that admonition, I want to again advise you and admonish you, as I said, that this is argument and these gentlemen would not intentionally misstate the evidence.

But oftentimes, as I said, they may be in error. And I'm not going to evaluate who may or may not be in error here. They may both be right.

But as I said, rely on your own recollection. And if you have any question, as I said, you can come back and we'll read any testimony back you feel you may need.

So again, with that admonition, you may continue, Mr. Merwin.

[2147]

Mr. Merwin: Thank you. I think one way to approach this particular issue is to ask yourself whether or not the acts involved in the Pensinger home and the acts involved with Mrs. Stone are the acts of a rational person or a sane person.

Do you need a psychiatrist to take the stand and tell you they are not?

Certainly, the Stone case, I think illustrates even better than the current one the irrationality of the acts: asleep in bed, having had sex, she's awakened, she's threatened with a knife, she says, "come on, cut it out," or, "get out of here," something like that; and for no reason at all, no reason at all is stabbed.

Then something happens. Police are called. Mr. Payton renders first aid. Hardly the act of someone who is not under some kind of mental disorder resulting from some kind of diminished capacity.

Seems to me it's hard to rationalize the facts to any other conclusion.

Referring now to "g," the specific factor set out in the law is whether or not the defendant acted under the extreme duress or under substantial domination of another

We talked about that. That's obviously not applicable.

"I," the age of the defendant at the time of the crime. That is applicable. We know from the evidence that

[2148]

he was 26. We know from that stipulation if you -- if you go backwards, he was 26.

Mr. Jacobs: I think we said 28.

The Court: Obviously a good time for me to indicate, as I said, as I said, I believe the stipulation was 28. This is, as I said, again admonish you not to rely on these gentlemen's argument. So with that comment, I think 28 was the stipulation.

Mr. Merwin: The stipulation was he is 28. The factor calls for the age of the defendant at the time of the crime.

The Court: You're correct. See, now we're both wrong. You may continue.

Mr. Merwin: So if you go backwards in time, that puts him at 26 or 27. We don't have the exact date of birth because that wasn't included in the stipulation. But we're talking about someone who, by virtue of age, is immature. We're not talking about someone who is in his 40's or 50's who has demonstrated by a long list of convictions or a long list of other incidents that he's mature or that he has established himself as someone not deserving of our continued concern.

We're talking about a 26-year-old immature man. I think the age here is important, not just for that point, but also because that leaves him the rest of his productive life in prison, potentially, ahead of him. Potentially,

[2149]

if that's the verdict of this jury, that's a lot of years of potentially productive existence.

So I think age is a factor, and I think it's an important factor.

When we were talking about these factors in individual jury selection, we commented at some length about how you go about analyzing them. You don't count them up. You weigh them against each other. You can give age any weight you think

it's entitled to. You could give it zero weight or you could say that that's the most important factor on that board. That's up to each of you individually to decide.

Next one, "j," is whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

Here again, Mr. Jacobs and I agreed on this. It's just not applicable. That's designed for a case where there's more than one defendant.

Finally, here's one we disagree on rather strenuously. And that's the last one, which is "k," which is any other circumstance which extenuates the gravity of the crime even though it's not a legal excuse for the crime.

Mr. Jacobs tells you that's not applicable. If that's not applicable and that therefore all the evidence we presented is not applicable, why didn't we hear any objections to its relevance?

[2150]

Mr. Jacobs: Well, that's not a proper thing to say either because we'd be outside the presence of the jury.

(Continued on page 2151; nothing omitted.)

[2151]

The Court: Yes. As I said, I'm not going to repeat the admonition, but, as I said, you may continue, Mr. Merwin.

Mr. Merwin: The whole purpose for the second phase or trial is to decide the proper punishment to be imposed. Everything that was presented by the defense relates directly to that.

This section "k" may be awkwardly worded, but it does not preclude or exclude the kind of evidence that was presented. It's a catch-all phase [sic]. It was designed to include, not exclude, that kind of evidence.

Any jury that wanted -- that was in the position of trying to determine the fairest possible sentences, select them between death or life without possibility of parole, would not only want that kind of evidence but would need it to make an intelligent decision.

I submit the facts of this case, and this would not always be true, that that is the most critical of the factors, not only is it not irrelevant, it's the most critical of all the factors and I want to go through some of the reasons for that with you.

I think the evidence that was presented showed a number of extenuating or mitigating circumstances that fall into the general category of extenuating circumstances that cannot rise to the level of an excuse or defense to the crime and that is what we were presenting.

For instance, the evidence showed that Mr. Payton's

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bright. He authored, has authored an autobiography. He's taken a course in calculus. He's been accepted to a Bible -- correspondence Bible college. It also shows he has tremendous leadership potential that not only was recognized by his pastor who knew him but when he was 16, 17 and 18, but has demonstrated by his conduct in the jail. He has apparently on his own set up some of these programs that resulted in Bible studies and even has assisted other inmates in resolving their own problems regarding their own faith.

He is talented and I submit there's a section of the literature that was presented, and whether or not you choose to interpret the frolicking seals as an indication of callousness or as an indication of talent, there's no way to indicate the way it was written and the only basis on which it was authored and accepted.

I think the writing of his experiences in Cam Ranh Bay is also an equal illustration of his talent and his general ability.

I think most important, though, the evidence to me demonstrated that he has found a new productive, forward looking purpose for his life, and he plans to devote his life to that, namely, the prison ministry.

The way this was treated by Mr. Jacobs was so flippant I couldn't believe it.

Let's think about it. The first reaction it might be all right, whenever the door is slammed shut, you get

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religion. That may be true with some people, so judge for yourself the sincerity of Mr. Payton. Judge for yourself the sincerity of the witnesses who took the stand and said no, I know he's sincere.

You heard his mother. I think it was hard to believe she was insincere when she told you she knew he was sincere. You heard about all the hours he spent with other inmates trying to help them resolve their own problems dealing with their faiths.

That doesn't sound like insincerity on my part, or it doesn't sound like that to me.

You could ask Keith Dandley who was one of the witnesses whether he thinks he was sincere. He testified under oath he saved his life. He talked him out of suicide by redirecting his life, by affecting his faith. Now, that's someone who knows better. To him it's not a joke. It's not something that should be taken lightly or flippantly.

I don't think you got that impression from Barbara Seglie either. She testified as a missions director for a local church who spends hours and hours and hours dealing with Mr. Payton and who plans to continue working with him in the event the sentence here is life without parole.

I don't think she considers her time that valueless or what she is doing that valueless.

Apart from sincerity, which I think is obvious and was never even refuted, not one witness said he felt

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or she felt he was insincere. The next question seems to me is could Mr. Payton have a productive prison ministry or could he do something valuable for other inmates or for others in prison.

I think the obvious answer there is that he could. He's demonstrated that he could. He's not just talking about it. We're not just putting on people to say well, gee, I have found religion, therefore, give me a break.

What he's doing with his deeds is demonstrating that he can play a productive role in a lifetime prison setting.

One example, again, is Keith Dandley. How many lives could he save in the course of the next 40 or 50 years while he's in prison. He's already saved the one and I'm not talking about spiritual saving. That's another, aspect to be considered.

But just in terms of talking Keith Dandley out of committing suicide, I think he's done a tremendous service and demonstrated his value to all of us.

We know that he's helped in terms of keeping the lid on or keeping violence down in the jail. Deputy Engen, I think I may be mispronouncing his name, was clear on that. He said he was glad to have him in his mod and the reason was he not only was able to help calm down other inmates which, of course, is becoming increasingly difficult for the system to cope with, but he would bring to the deputy

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sheriff's attention problems before they actually developed so they could be resolved and resolved without violence. That obviously has an advantage to all of us and that's a role he could and has demonstrated he would play if the sentence was life without possibility of parole.

I think when you decide what value ought to be placed on what Mr. Payton could do within a prison setting for the rest of his life, you have to think of first his value to other inmates by

helping keep the lid on or calm his fellow inmates. He prevents violence. By writing, he might brighten someone's life.

(Continued on page 2156; nothing omitted.)

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By communicating his faith and his feelings to others, he may help someone else spiritually. And those people may get out of prison some day, and those people may influence others.

I think there are a lot of good reasons to keep Bill Payton alive, an awful lot of good reasons. And that's exactly what I think " k" is talking about.

Are there good reasons for you folks to vote to keep Bill Payton alive, and I submit there are.

One last observation. And that's that I trust that none of you (sic) when you go into that room will demonstrate your own personal respect for human life by deliberately destroying it.

Thank you.

The Court: Ladies and gentlemen, with regard to the instructions the Court's about to give you, want to indicate to you that you've previously been instructed, and the instructions I previously gave will be given to you again in the jury room to use if applicable in the penalty phase of this trial.

However, I want to indicate to you that the fact that a few of the instructions may be given twice you're to draw no inference that they are intended to be given more weight than any other instruction.

So with that general statement, every person who testifies under oath or affirmation as a witness, you are

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the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

In determining the believability of a witness you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following:

The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified;

The ability of a witness to remember or to communicate any matter about which the witness has testified;

The character and quality of that testimony;

The demeanor and manner of the witness while testifying;

The existence or non-existence of a bias, interest, or other motive;

Evidence of the existence or non-existence of any fact testified to by the witness;

The attitude of the witness towards the action in which testimony has been given by the witness or toward the giving of testimony;

A statement previously made by the witness that is consistent or inconsistent with the testimony of the witness;

The witness's prior conviction of a felony.

Testimony which you believe given by one witness

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is sufficient to prove for the proof of any facts. However, before finding any fact required to be established by the prosecution to be proved solely by the testimony of a single witness, you should carefully review all of the testimony upon which the proof of such fact depends.

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. You must not draw any inference from the fact that he has not testified. Further, you must neither discuss this matter or permit it to enter into your deliberations in any way.

As pertaining to the evidence of other crimes not charged at this trial, but introduced at the penalty stage, the following is applicable:

In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support a finding against him on any such essential element.

As to evidence of other crimes committed by the defendant not charged in this case, such offenses before they can be considered must be proven to you beyond a reasonable doubt, as has previously been defined to you.

In determining the penalty to be imposed on the defendant, you shall consider all of the evidence which has

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been received during any part of the trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:

(a), The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

(b), The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

Presence or absence of any prior felony conviction.

Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

Whether or not the offense was committed under circumstances which defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g), Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h), Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality

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of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defects or the effects of intoxication.

(i), The age of the defendant at the time of the crime.

(j), Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k), Any other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime.

The defendant in this case has been found guilty of murder of the first degree. The charge that the murder was committed under a special circumstance has been found to be true. It is the law of this state that the penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstances charged in this case has been found to be true.

Under the law of this state, you must now determine which of said penalties shall be imposed on the defendant.

It is now your duty to determine which of the two penalties, death or confinement in the state prison without possibility of parole, shall be imposed on the defendant.

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After having heard all of the evidence and after having heard and considered the argument of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

(Continued on page 2162; nothing omitted.)

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If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.

However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

You shall now retire and select one of your numbers to act as foreman who will preside over your deliberations.

In other words, to make a determination to the penalty, all 12 jurors must agree.

Any verdict that you reach must be dated and signed by your foreman on a form that will be provided and then shall return it to this courtroom.

The clerk will now swear the bailiff to take charge of the jurors with the exception of the two alternates.

(Clerk swears the bailiff.)

The Clerk: Would you state your name for the record.

The Bailiff: Kevin Laughlin, L-A-U-G-H-L-I-N.

The Court: All right, Mr. Bailiff.

(Jurors exited the courtroom.)

(The following proceedings had in open court:)

The Court: The clerk will swear the bailiff to take charge of the alternates.

(Clerk swears the bailiff.)